(13)

No. 87-1956-ADX
Status: GRANTED

Title: Anthony M. Frank, Postmaster General of the United States, et al., Appellants
v.
Minnesota Newspaper Association, Inc.

Docketed:
May 27, 1988

Court: United States District Court
for the District of Minnesota

Counsel for appellant: Solicitor General

Counsel for appellee: Anfinson,Mark R.

Entry	Date	Note	Proceedings and Orders
2	Mar 14 1988		Extension of time to docket an appeal filed.
3	Mar 17 1988		Granted to and including May 27, 1988 by Justice Blackmun.
1	May 27 1988	G	Statement as to jurisdiction filed.
4	Jun 24 1988		Brief amici curiae of American Newspaper Publishers Association, et al. filed. VIDED.
5	Jul 1 1988		Motion of appellee Minnesota Newspaper Assn., Inc. to affirm filed.
6	Jul 27 1988		Reply brief of appellants Anthony M. Frank, etc., et al. filed.
7	Aug 3 1988		DISTRIBUTED. September 26, 1988
8	Oct 3 1988		PROBABLE JURISDICTION NOTED. The case is consolidated with 87-1943, and a total of one hour is allotted for oral argument.
			**********
9	Oct 12 1988		The federal parties will file a consolidated opening brief in Nos. 87-1943 and 87-1956 on or before November 17, 1988. Minnesota Newspaper Association, Inc. will file a consolidated responsive brief in both cases. The federal parties will file a consolidated reply brief.
10	Oct 21 1988		Record filed.
		*	Certified copy of original record received. (vide: 87-1943).
11	Nov 17 1988		Joint appendix filed. VIDED.
12	Nov 17 1988		Brief of appellants Postmaster General, et al. filed. VIDED.
17	Nov 22 1988		8ISTRIBUTED. Jan. 6, 1989. (Motion of appellee to dismiss).
14	Dec 6 1988		Order extending time to file brief of appellee on the merits until January 23, 1989.
19	Dec 23 1988	D	Motion of appellee to dismiss the appeal filed.
18	Dec 28 1988		DISTRIBUTED. Jan. 6, 1989. (Motion of appellee to dismiss and oppostion thereto).
16	Dec 29 1988	X	Memorandum of appellants in opposition to motion to dismiss filed.
20	Jan 9 1989		Motion of appellee to dismiss the appeal DENIED.
23	Jan 20 1989		Brief amici curiae of ACLU, et al. filed.
21	Jan 23 1989		Brief of appellee Minnesota Newspaper Assn., Inc. filed.
22	Jan 23 1989		Brief amicus curiae of Association of National Advertisers filed.
24	Feb 3 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 22, 1989. (1ST CASE)
26	Feb 14 1989	G	Application (A88-660) to extend the time to file a reply

No. 87-1956-ADX

Entry	Date	Note	Proceedings and Orders
			brief from February 22, 1989 to March 4, 1989, submitted to Justice Blackmun.
25	Feb 15 1989		CIRCULATED.
27	Feb 16 1989		Application (A88-660) granted by Justice Blackmun extending the time to file until March 3, 1989.
28	Mar 1 1989	X	Reply brief of appellants Anthony M. Frank, etc., et al. filed.
29	Mar 20 1989		Letter from Solicitor General received and distributed.
30	Mar 22 1989		ARGUED.

87-1956

No.

Supreme Court, U.S.
FILED
MAY 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES,
ET AL., APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Section 1302 para. 5 of Title 18 makes it a crime knowingly to mail "any newspaper, circular, pamphlet, or publication of any kind" containing "any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance," or "any list of the prizes drawn or awarded" by means of any such lottery or similar enterprise. The question presented is whether the prize list clause in Section 1302 is facially invalid under the First Amendment.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the United States Postal Service and the United States of America were named as defendants in the court below.

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In the Supreme Court of the United States

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No.

ANTHONY M. FRANK,
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v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-20a) is reported at 677 F. Supp. 1400.

JURISDICTION

The judgment of the district court (App., *infra*, 21a-22a) was entered on January 6, 1988. A notice of appeal (App., *infra*, 23a-24a) was filed on January 28, 1988. On March 17, 1988, Justice Blackmun entered an order extending the time within which to docket this appeal to and including May 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted at App., *infra*, 25a-33a.

STATEMENT

This is an action brought by an association of Minnesota newspapers challenging, under the First Amendment and the Due Process Clause, the congressional regulation of the use of the mails in connection with the promotion of lotteries, 18 U.S.C. 1302 and 1307; 39 U.S.C. 3001 and 3005. On cross-motions for summary judgment, the district court held that the statutory ban on mailing lottery advertisements was a valid regulation of commercial speech. By contrast, the court held that an associated prohibition on the mailing of prize lists was invalid, on the ground that the clause could be used to ban the mailing of newspapers containing news reports about lotteries.

A. Historical And Statutory Background

1. Lotteries have an ancient pedigree. In England and in colonial times in this country, lotteries were a popular and respectable activity.[1] Beginning in the Jacksonian period, however, the states began to restrict or prohibit both privately-operated and state-run lotteries for a variety of reasons, such as "animosity toward legislatively-created privilege, concern for efficiency in government, distaste for fraud and corruption, and sympathy for the

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[1] See generally J. Ezell, *Fortune's Merry Wheel* 1-59 (1960); A. Spofford, *Lotteries in American History*, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 174-195 (1893); National Inst. of L. Enforcement & Crim. Just., LEAA, U.S. Dep't of Justice, *The Development of the Law of Gambling: 1776-1976*, at 500-519 (1977) [hereinafter *The Development of the Law of Gambling*]; Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923 (1978).

poor upon whom the burden of the lottery system was thought to fall."[2]

A major obstacle to that reform effort was the states' inability to regulate lotteries that operated across state lines. The states lacked authority to prosecute lottery operators who conducted business in another jurisdiction, or to regulate a lottery operator's use of the mails to distribute tickets and advertisements. The states were forced to attack lotteries within their borders "at the consumer level—a difficult, expensive, and unpopular task."[3] The states therefore turned to the Post Office and to Congress for assistance.

2. Congressional restrictions on the use of the postal service in connection with lotteries date from 1827. In that year, Congress prohibited postmasters from serving as lottery agents and from receiving "lottery schemes, circulars or tickets" free of postage. Act of Mar. 2, 1827, ch. 61, § 6, 4 Stat. 238. Forty-one years later, Congress made it a crime to deposit in the mails "any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. In 1872, Congress passed legislation prohibiting the mailing of letters or circulars concerning "illegal" lotteries. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302. That term, however, was stricken four years later in order to exclude from the mails materials from all lotteries, including ones chartered by state legislatures. Act of July 12, 1876

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[2] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 927. The dominant Nineteenth Century view was that lotteries were harmful to society. See, *e.g.*, *Champion* v. *Ames (Lottery Case)*, 118 U.S. 321, 356-358 (1903); *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1879); *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 168 (1850).

[3] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 931.

(1876 Act), ch. 186, § 2, 19 Stat. 90 (codified at Rev. Stat. § 3894 (2d ed. 1878)).[4]

This Court upheld the constitutionality of the 1876 Act in *Ex parte Jackson*, 96 U.S. 727 (1878), over the objection that it violated the First Amendment. Still, the Act was widely viewed as an ineffective weapon against lotteries. Among other inadequacies,[5] the Attorney General concluded that the 1876 Act did not to apply to newspapers, even if they contained lottery advertisements.[6] Yet newspaper advertisements were often used to promote lottery sales, since newspapers enjoyed second-class mailing privileges and therefore were less expensive to distribute than letters containing lottery circulars.[7]

That shortcoming made the Act particularly ineffective against the powerful "Louisiana Lottery," the only legal lottery still operating in 1890 when the predecessor to the statute at issue in this case was passed.[8] The Louisiana

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[4] See *Horner* v. *United States*, 147 U.S. 449, 456, 466 (1893); 4 Cong. Rec. 3656 (1876) (Rep. Cannon); *Lottery Circulars*, 15 Op. Att'y Gen. 203, 203-204 (1877).

[5] One shortcoming in the Act was that the Postmaster General lacked the authority to seize letters that he suspected of containing lottery advertisments. *Lotteries*, 16 Op. Att'y Gen. 5 (1878).

[6] *Lotteries—Non-Mailable Matter*, 18 Op. Att'y Gen. 306, 309 (1885). The Attorney General concluded that a newspaper did not become a "circular" by publishing an advertisement. *Id.* at 309.

[7] See 21 Cong. Rec. 8714 (1890) (Rep. Evans).

[8] *Exclusion of Lotteries from Postal Facilities*, 17 Op. Att'y Gen. 77, 77 (1881) (emphasis in original) (the Louisiana Lottery "is the *only* lottery conducted under the sanction of law in the United States"); see 21 Cong. Rec. 8714-8717 (1890) (summary of state laws prohibiting lotteries); H.R. Rep. 2678, 49th Cong., 1st Sess. 2-3 (1886) (same); S. Rep. 11, 49th Cong. 1st Sess. 1-11 (1886) (same); H.R. Rep. 787, 50th Cong., 1st Sess. Pt. 2, at 1-2 (Views of the Minority) (1888).

Lottery operated nationwide and used the mails as its principal means of obtaining revenues from the public in other states,[9] deriving more than 90% of its revenue from out-of-state bettors.[10] Because the Attorney General had concluded that the 1876 Act did not apply to newspapers, however, that Act did not hamper the Louisiana Lottery from soliciting customers through newspaper advertising.

After several years of debate,[11] Congress remedied that shortcoming by adopting the Anti-Lottery Act of 1890,

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[9] *Use of the Mails for Lottery Purposes,* H.R. Exec. Doc. 22, 46th Cong., 2d Sess. 16 (1880) (Letter from the Postmaster-General Key to the House of Representatives) ("[t]he lottery company most extensively using the mails for the transmission of its circulars, tickets, & c., is the Louisiana State Lottery"); *id.* at 27-28 (Letter from New York City Post Office General Superintendent Forrester to New York City Postmaster James (Oct. 14, 1879)); *id.* at 28-29 (Letter from New Orleans Postmaster McMillen to Assistant Attorney General Freeman, Post Office Dep't (Nov. 4, 1879)); Letter from New Orleans Postmaster McMillen to Postmaster-General Key (Nov. 12, 1879)); J. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897,* H.R. Misc. Doc. 210, 53d Cong., 2d Sess. Pt. 9, at 80-81 (Special Message to Congress from President Harrison (July 29, 1890) (noting that it would be "practically impossible" for lotteries to survive if the mails were closed to them); 21 Cong. Rec. 8706 (1890); *id.* at 8711 (statement of Rep. Wilkinson); *id.* at 8717 (statement of Rep. Hitt); *id.* at 8721 (statement of Rep. Price); J. Ezell, *supra,* at 251; *The Development of the Law of Gambling* 673-677; Blakey & Kurland, *supra,* 63 Cornell L. Rev. at 935-936.

[10] 21 Cong. Rec. 8706 (1890) (statement of Rep. Moore that the Louisiana lottery derived 93% of its income from out-of-state bettors); J. Ezell, *supra,* at 251.

[11] See S. Rep. 233, 48th Cong., 1st Sess. (1884); *id.* at 12-15 (Views of the Minority); H.R. Rep. 826, 48th Cong., 1st Sess. (1884); S. Rep. 11, 49th Cong., 1st Sess. (1886); H.R. Rep. 2678, 49th Cong., 1st Sess. (1886); *id.* at 4-6 (Views of the Minority); H.R. Rep. 787, 50th Cong., 1st Sess. (1888); *id.* Pt. 2, at 1-4 (Views of the Minority); S. Rep. 1579, 51st Cong., 1st Sess. (1890); *id.* at 1-4 (reprinting House

ch. 908, 26 Stat. 465 (1890 Act), the direct predecessor to the statute at issue in this case. In order to deny lotteries the use of the mails to attract customers, the Act outlawed the mailing of "any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing." The constitutionality of the new Act was challenged in *In re Rapier,* 143 U.S. 110 (1892), and this Court again upheld the statute over a First Amendment objection. Although the Louisiana Lottery closed up its business in that state in 1893,[12] the lottery set up new headquarters in Honduras and used a Florida address for communications.[13] When Congress realized that the Louisiana Lottery had not yet been finally shut down, it passed the Act of Mar. 2, 1895, ch. 191, 28 Stat. 963, which made it a crime to import or transport lottery tickets in foreign or interstate commerce.[14] The constitutionality of that Act was also challenged, and this Court once again upheld it in *Champion* v. *Ames (Lottery Case),* 188 U.S. 321 (1903), this time over the claim that the Act exceeded Congress's power under the Commerce Clause, Art. I, § 8, Cl. 3.

Report); see generally J. Ezell, *supra,* at 251-263; *The Development of the Law of Gambling* 513-518; Blakey & Kurland, *supra,* 63 Cornell L. Rev. at 937-940.

[12] Some contemporary commentators have concluded that the Anti-Lottery Act of 1890 was instrumental in bringing about the demise of the Louisiana Lottery. J. Ezell, *supra,* at 263-264; Blakey & Kurland, *supra,* 63 Cornell L. Rev. at 940.

[13] J. Ezell, *supra,* at 267-268.

[14] *Id.* at 268-269.

3. The prohibition on the mailing of publications containing lottery advertisements or prize lists enacted as the Anti-Lottery Act of 1890 survives, with minor amendments not relevant here,[15] as 18 U.S.C. 1302 para. 5. In relevant part, that provision makes it a crime knowingly to mail "[a]ny newspaper, circular, pamphlet, or publication of any kind" containing "any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance," or "any list of the prizes drawn or awarded" by means of any such lottery or similar enterprise. Section 1302 does not apply, however, to advertisements for a state-conducted lottery contained in a newspaper published in that state, or in an adjacent state that also has a state-conducted lottery. 18 U.S.C. 1307.[16]

Under complementary provisions of the Postal Code, any material that is excluded from the mail under 18 U.S.C. 1302 is deemed to be "nonmailable" and subject to seizure. 39 U.S.C. 3001. The Postal Service may refuse to deliver lottery-related responses for, or permit the payment of money orders to, a person conducting a lottery. 39 U.S.C. 3005. After an administrative proceeding, the

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[15] Act of Mar. 2, 1895, ch. 191, 28 Stat. 963; Act of Mar. 4, 1909, ch. 321, § 213, 35 Stat. 1129-1130; Act of June 25, 1948, ch. 645, § 1302, 62 Stat. 762; Act of Oct. 31, 1951, ch. 655, § 29, 65 Stat. 721; Act of Sept. 13, 1961, Pub. L. No. 87-218, § 2, 75 Stat. 492.

[16] Related provisions of Title 18 include: Section 1301, which prohibits the importation or interstate transportation of lottery tickets, advertisements, or lists of prizes; Section 1303, which prohibits any Postal Service officer or employee from acting as a lottery agent; Section 1304, which prohibits broadcasters from broadcasting lottery advertisements; Section 1305, which creates a special exemption for fishing contests; and Section 1306, which prohibits financial institutions from selling lottery tickets for state-operated lotteries.

Postal Service may return to a sender mail, appropriately marked as in violation of Section 3005, addressed to any person engaged in a lottery or a scheme involving fraud or false representations. 39 U.S.C. 3005. And under 39 U.S.C. 3007, the Postal Service may sue in federal court and, on a showing of probable cause, obtain a preliminary injunction detaining lottery-related incoming mail to a person alleged to be engaged in a lottery or similar scheme, pending the conclusion of those administrative proceedings.

B. Proceedings Below

Appellee Minnesota Newspaper Association, Inc., is an organization of general and special interest newspapers published in Minnesota. Minnesota law allows non-profit charitable organizations to operate gaming activities for fund-raising purposes. App., *infra,* 1a-2a. Appellee claimed that its member newspapers distributed a significant portion of their circulation through the mails and that its members wanted to publish advertisements and news stories about these lotteries, but were afraid to do so because of uncertainty about the meaning of 18 U.S.C. 1302 and 39 U.S.C. 3001 and 3005, and because of warnings they had received from local postal inspectors to the effect that that they could be prosecuted for mailing such materials. App., *infra,* 3a. Appellee therefore brought this action in the United States District Court for the District of Minnesota, challenging the constitutionality of those statutes under the First Amendment and the Due Process Clause.

On cross-motions for summary judgment, the district court granted partial summary in favor of each party. The court held that the statutes were constitutional insofar as they applied to lottery advertisements, but that they

violated the First Amendment to the extent that they restricted the mailing of lists of lottery winners. App., *infra*, 4a-20a.

The district court first held that lottery advertisements (including advertisements containing prize lists) fell squarely within the definition of "commercial speech," and that the restrictions imposed by 18 U.S.C. 1302 on mailing such advertisements met the standards for the regulation of commercial speech set forth by this Court in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980), and *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, No. 84-1903 (July 1, 1986). App., *infra*, 7a-13a. Although the advertisements that appellee's member newspapers sought to publish concerned lawful activity that was not inherently misleading (*id.* at 8a), the court found that the statutory restrictions were valid because they advanced two substantial governmental interests: Congress's interest in preserving the states' power to prohibit or limit gambling within their borders, and Congress's interest in restricting the interstate growth of private lotteries and reducing the threat of organized criminal involvement in gambling activity. *Id.* at 8a-11a. Both interests, the court held, were directly advanced by Section 1302 in a manner no more extensive than is necessary. App., *infra*, 11a-13a.

The court also concluded that the statute should not be construed to extend to general news reports or editorial comment concerning lotteries. Those materials, the court held, can be distributed through the mails. App., *infra*, 16a.

Notwithstanding its conclusion that the statute does not extend to news stories and editorial commentary, the district court nevertheless concluded that the prize list clause was unconstitutional. App., *infra*, 13a-15a. The court recognized that a list of prize winners is an effective promotional device for a lottery, but ruled that such a list

does not amount to commercial speech unless it is found in an advertisement. *Id.* at 13a-14a. Because Section 1302 independently prohibits the mailing of advertisements promoting lotteries, the court concluded that the prize list clause was designed to restrict the publication of prize lists in noncommercial speech (App., *infra,* 14a), and therefore was invalid unless the restriction was narrowly tailored to serve a compelling governmental interest. *Ibid.* Finding that the interests promoted by Section 1302 were not compelling, the court held the prize list clause was unconstitutional, but could be severed from the remainder of the statute. App., *infra,* 14a-15a, 16a. The court acknowledged that its holding was inconsistent with this Court's decision in *In re Rapier, supra,* but it concluded that the rationale of that ruling had been superseded by this Court's more recent First Amendment decisions. App., *infra,* 15a.

The district court accordingly entered a judgment declaring, inter alia, that "the restrictions in 18 U.S.C. § 1302, and its implementing regulations, on the mailing of lists of prizes awarded from a lottery are unconstitutional" and permanently enjoined appellants "from further enforcement of the restrictions on prize lists." App., *infra,* 20a; *id.* at 21a-22a.[17]

THE QUESTION IS SUBSTANTIAL

Private organzations sometimes conduct lotteries to raise revenues. There is a longstanding federal policy

[17] The court also rejected appellee's equal protection challenge to the advertising restriction of 18 U.S.C. 1302, on the ground that the distinctions complained of were rationally related to legitimate governmental interests. App., *infra,* 17a-19a. Finally, the court ruled that 39 U.S.C. 3001 and 3005 could not be applied to restrict the mailing of newspapers containing prize lists in news reports. App., *infra,* 19a.

against the use of the mails to promote such lotteries, whether or not they are legal under state law. Thus, it is illegal to import tickets for such lotteries in foreign commerce, or to distribute such tickets in interstate commerce or through the mails, 18 U.S.C. 1301 and 1302, or to distribute through the mails publications that contain advertisements about such lotteries or lists of the prizes they award. 18 U.S.C. 1302. The constitutionality of this regulatory scheme had been upheld by this Court on three separate occasions: the Court twice rejected First Amendment challenges to the predecessor versions of Section 1302 in *Ex parte Jackson*, 96 U.S. 727 (1878), and *In re Rapier*, 143 U.S. 110 (1892), and rejected a Commerce Clause challenge to the predecessor to Section 1301 in *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321 (1903).

In this case, the district court upheld over a First Amendment challenge the clause forbidding the distribution through the mails of publications containing lottery advertisements, but held unconstitutional the parallel clause in that section prohibiting the mailing of publications containing lists of prizes awarded by lotteries. The district court ruled that the prize list clause was unconstitutional because it could be used to restrict the distribution through the mails of news reports about lotteries. The district court, however, misinterpreted the prize list clause, which complements the advertisement clause. Properly construed, the ban on the mailing of publications containing lottery prize lists is valid for the same reasons given by the district court for upholding the ban on the mailing of publications containing lottery advertisements.

1. a. The district court noted that Section 1302 contains separate clauses prohibiting the mailing of lottery advertisements and the mailing of lists of prizes awarded in a lottery. The court concluded that the advertisement

clause was directed at commercial speech, and that the constitutionality of that clause must be examined under the reduced standard of protection that is appropriate for commercial speech. See, *e.g.*, *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, No. 84-1903 (July 1, 1986); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980); *Friedman* v. *Rogers*, 440 U.S. 1 (1979); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). But the district court also reasoned that, because a prize list contained in an advertisement would be independently covered by the advertisement clause, the prize list clause must have been designed to apply to something other than commercial speech. App., *infra*, 13a-14a. Accordingly, the court concluded that the prize list clause, unlike the advertisement clause, had to be measured against the higher standard of review appropriate for noncommercial speech.

The fatal flaw in the district court's reasoning is its unstated assumption that commercial speech is exactly coterminous with advertising, and that a statutory provision directed at a particular type of speech intended to promote the success of a lottery can be considered commercial speech only if it is contained in an advertisement. But this Court has never equated commercial speech with advertising. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66-68 (1983). Instead, the Court has consistently identified "the core notion of commercial speech" (*id.* at 66) as those forms of expression that do "no more than propose a commercial transaction" (*Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)), or that are "related solely to the economic interests of the speaker and its audience" (*Central Hudson*, 447 U.S. at 561). An advertisement that "communicate[s] information, expresse[s] opinion,

recite[s] grievances, protest[s] claimed abuses, and [seeks] financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern" (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964)) clearly would not be regarded as commercial speech. Equally clearly, certain types of expression not ordinarily described as advertising but integrally related to a commercial transaction—such as a proposed contract—would have to be regarded as commercial speech. The key elements of commercial speech, therefore, are its subject matter (whether it relates to an ordinary commercial transaction) and the relationship of the speaker to the transaction (whether the speaker has direct financial interest in the transaction or in the promotion of the transaction), not whether the speech is formally denominated as "advertising."

For example, under this Court's decisions a newspaper could publish news stories or editorials about lotteries, their prizes, or their participants, and those forms of discourse would clearly not be regarded as commercial speech. In our view, moreover, if a newspaper published a list of winning lottery numbers because it believed that the list or the numbers themselves were newsworthy, that too should not be considered as commercial speech, even if the newspaper published the list because it hoped to increase its circulation and thereby increase its revenues. But if the newspaper published a list of prizes because it expected to receive a share of a lottery's proceeds, or because it had sponsored the lottery itself, such a list in our view *would* amount to commercial speech, because it would be speech directly related to a commercial transaction in which the newspaper has a financial interest. Similarly, if the newspaper were paid to publish a list of prizes, such a list should be regarded as commercial speech, because it would

be speech about a commercial transaction that the newspaper had been directly paid to promote.

The district court was therefore in error in concluding that a statute that regulates something other than advertising cannot be regarded as a regulation of commercial speech. The prize list clause of Section 1302 can and should be construed to apply only to a form of commercial speech—*i.e.*, the publication of lists of lottery prizes by one who has a direct financial interest in a lottery or in its promotion—and not to other forms of discourse about lotteries, such as editorials or news stories. So construed, that clause is a lawful restriction on commercial speech promoting lotteries.

b. This construction of Section 1302 is supported by the language of the statute. As the district court recognized (App., *infra*, 16a), Section 1302 does not list news reports among the items to which the statute applies, and its structure shows that it was not designed to exclude from the mails documentaries, news stories, or editorials about lotteries. It applies to "[a]ny newspaper, circular, pamphlet, or publication of any kind," and therefore is sufficiently broad to include various promotional materials that contain nothing resembling a news story.[18] The all-inclusive scope of the statute suggests that the prize

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[18] The text of the Anti-Lottery Act of 1890 made the same point. As adopted, the first clause of that Act applied to any "letter, postal-card, or circular concerning any lottery" and any "list of the drawings at any lottery." The second clause referred to "any newspaper, circular, pamphlet, or publication of any kind containing any advertisment of any lottery * * * or containing any list of prizes awarded at the drawings of any such lottery." § 1, 26 Stat. 465 (Rev. Stat. § 3894 (Supp. 2d ed. 1874-1891)). That section included prize lists that were found in all types of mailed matter, including the types of promotional materials that would be generally distributed by the sponsors of a lottery, or that would be sent to an individual in response to an inquiry about a lottery's prizes.

list clause was not designed to zero in on news reports or editorials about lotteries. The most likely reason Congress included a separate prize list clause was to ensure that the Act would apply to circulars or other promotional materials distributed by the sponsor of a lottery that would not be regarded as either an advertisement or a legitimate news story.[19]

Moreover, the fact that Section 1302 lists lottery advertisements and prize lists in tandem strongly suggests that these clauses should be read in a complementary manner. See, *e.g.*, *Third Nat'l Bank* v. *Impac Ltd.*, 432 U.S. 312, 322 (1977); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893).[20] Lotteries, like other forms of gambling, often use prize lists for the same purpose as advertisements: in order to attract participants. By identifying the prizes that will be (or have been) awarded in a lottery, a prize list can promote future sales of lottery tickets. A prize list can also serve as a device for notifying winners, a function essential to the conduct of a lottery. The prize list clause should therefore be read as applying to the same conduct as the

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[19] Some lottery sponsors may not have included a list of their prizes in every circular. For example, in 1880 the Postmaster General reported that the National Banking Company issued bonds on the drawings of the Louisiana, Havana, and Kentucky lotteries, and that one of its circulars said: "Circulars containing list of securities dealt in, with full and explicit information, sent free." *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. 22, *supra*, at 9.

[20] "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. at 307. This maxim stated a "familiar" rule that was "applicable to all written instruments" in 1893. *Virginia* v. *Tennessee*, 148 U.S. at 519. It is therefore reasonable to assume that Congress was aware of that rule when Congress adopted the Anti-Lottery Act of 1890 and to interpret Section 1302 with that rule in mind.

advertisement clause, *i.e.*, to the use of the mails to promote a lottery by one who has a direct financial interest either in the lottery or in its promotion.

c. To be sure, if read expansively and without regard for the purpose Congress had in mind when it enacted the Anti-Lottery Act of 1890, the text of the prize list clause could be read to apply to editorial comment, documentaries, or other forms of discourse about lotteries, their participants, and their winnings. That construction of the statute would raise the type of serious First Amendment questions discussed by the district court. That court concluded that Section 1302 does not apply to those forms of discourse, however, and we agree with that ruling.

Congress did not adopt the Anti-Lottery Act of 1890 in order to deprive newspapers of the use of the mails for publishing news commentary about lotteries.[21] Rather,

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[21] There was considerable debate in Congress on the question whether the Anti-Lottery Act of 1890 would violate the First Amendment. Supporters of the Act argued that it was constitutional under this Court's decision in *Ex parte Jackson, supra*. See S. Rep. 233, 48th Cong., 1st Sess. 1 (1884); S. Rep. 11, 49th Cong., 1st Sess. 12 (1886); H.R. Rep. 2678, 49th Cong., 1st Sess. 1 (1886); H.R. Rep. 787, *supra*, Pt. 2, at 2-4 (Views of the Minority); 21 Cong. Rec. 8710 (1890) (Rep. Caldwell); *id.* at 8712 (Rep. Wilkinson). Opponents of the bill argued that *Ex parte Jackson* did not sanction the exclusion of newspapers from the mails, and that, if enacted, the Act would serve as a precedent for the exclusion from the mails of other types of commentary that future Congresses would find detrimental to the public. See S. Rep. 233, *supra*, at 13-15 (Views of the Minority); H.R. Rep. 826, 48th Cong., 1st Sess. 2-4 (1884); H.R. Rep. 2678, *supra*, at 4-6 (Views of the Minority); H.R. Rep. 787, *supra*, at 1. The Fifty-First Congress ultimately concluded that it was lawful to exclude newspapers containing lottery advertising from the mails. As Representative Wilkinson explained (21 Cong. Rec. 8712 (1890)):

> It is said also that this is a blow at the freedom of the press, which, with freedom of speech, Congress is forbidden by the first amendment to the Constitution to make any abridgement of.
>
> Sir, if this is a blow against the freedom of the press it is such a blow as the State of New York has struck where lottery advertise-

newspapers were listed in the Act because they were a relatively inexpensive way for a lottery to distribute advertisements and because the Attorney General had concluded that the existing law did not cover newspapers that published lottery advertisements. Congress therefore exercised its power under the Postal Clause, Art. I, § 8, Cl. 7, in order to deprive lotteries of the use of the mails to conduct or promote their games. In fact, by 1890 the Louisiana Lottery was the only lottery still operating legally, and it derived more than 90% of its revenue from out-of-state bettors. *It* was the target of the Anti-Lottery Act of 1890, not newspapers.[22] Congress concluded that the only effective way to suppress the Louisiana Lottery – to "cut [it] down to a mere local gambling establishment, answer-

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ments are forbidden in the newspapers. It is such a blow as other States in this Union have struck who have done likewise, but I have never yet heard it has there been considered a blow at the freedom of the press. The freedom of the press, as I understand it, consists in the right of the editors of the newspapers to freely express their views on public questions without let or hinderance by those in authority. It means to forbid that censorship of the press once so prevalent in European countries and still common in those countries, but this matter of advertisements seems to me to be a different affair. I hold in my hand as good a paper, as well supplied with news, as interesting as paper to read, perhaps, as any in the United States, a paper which is published in a State where lottery advertisements are forbidden and where no newspaper dares to print one, and it seems to thrive and prosper and makes no complaint that its rights have been interfered with.

[22] That is clear from the numerous references to the Louisiana Lottery during the consideration of the Anti-Lottery Act of 1890. See *Message from the President of the United States,* S. Exec. Doc. 196, 51st Cong., 1st Sess. 1 (1890); 21 Cong. Rec. 8699 (1890) (Rep. Hopkins); *id.* at 8705 (Rep. Moore); *id.* at 8707 (Rep. Hopkins); *id.* at 8707-8708 (Rep. Rogers); *id.* at 8708 (Rep. Hill); *id.* at 8711-8713 (Rep. Wilkinson); *id.* at 8713 (Rep. Evans); *id.* at 8719 (Rep. Hansbrough); *ibid.* (Rep. Blount).

able to the police powers of the local government" (21 Cong. Rec. 8717 (1890) (Rep. Hitt))—was to exclude from the mails newspapers and the other publications that contained its advertisements and related promotional materials and thereby deny the lottery access to its primary source of income.

The references in Section 1302 to "any advertisement of any lottery" and to "any list of the prizes drawn or awarded by means of any such lottery" should be interpreted in light of this overriding purpose. The materials that were the focus of Congress's concern were what would today clearly be called commercial speech. Interpreting Section 1302 to apply only to commercial speech is thus not "plainly contrary to the intent of Congress" (*DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, No. 86-1461 (Apr. 20, 1988), slip op. 6), and avoids the constitutional issues raised by the district court's interpretation of the Act. *Ibid.*; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501 (1979); *United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 130 n.7 (1973).[23] The prize list clause, like the advertisement clause, should be read as a restriction on commercial speech.

2. When read in the manner suggested above, the prize list clause in Section 1302 is valid for the same reasons given by the district court for upholding the advertisement clause in the same section: the prize list clause, like the advertisement clause, applies to a form of commercial speech, and the statutory scheme satisfies the standards

[23] In the *12 200-Ft. Reels of Film* case, for example, the Court said (413 U.S. at 130 n.7) that it would construe the term "obscene" in the federal laws prohibiting the importation of obscene material in a manner consistent with the definition of obscenity adopted in *Miller* v. *California*, 413 U.S. 15 (1973). A similar analysis is appropriate here.

for the regulation of commercial speech set forth in *Central Hudson* and *Posadas.*[24]

Section 1302 reasonably advances several legitimate governmental interests. The statute applies to both legal and illegal lotteries. *Horner* v. *United States,* 147 U.S. 449, 456, 466 (1893). To the extent that it reaches lotteries that are illegal under federal or state law, the statute is clearly valid, because the government may regulate or ban entirely speech proposing an illegal transaction. *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 496 (1982); *Central Hudson,* 447 U.S. at 563-564; *Pittsburgh Press,* 413 U.S. at 388. Section 1302 also may be constitutionally applied to advertisements and associated promotional material about lawful gambling activities. As the district court explained in connection with the advertisement restrictions, Section 1302 safeguards the policies of those states that have prohibited lotteries.[25] Moreover, by restricting the growth of private

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[24] The United States District Court for the District of Columbia also recently upheld the constitutionality of the advertisement clause in Section 1302 over a similar First Amendment objection. *Aimes Publications, Inc.* v. *United States Postal Service,* No. 86-1434 (D.D.C. Feb. 23, 1988), appeal pending (D.C. Cir.).

[25] Of course, the prohibition adversely affects the policies of those states that have authorized private lotteries. See *The Lottery Advertising Clarification Act: Hearings on H.R. 1568 Before the Subcomm. on Administrative Laws and Governmental Regulations of the House Comm. on the Judiciary,* 100th Cong., 1st Sess. 13-14, 20-22 (1987) (testimony of Deputy Assistant Attorney General Kmiec). When the Anti-Lottery Act was enacted in 1890, however, that matter was of little or no concern, because the Louisiana Lottery was then the only legal lottery still operating in the United States, and more than 90% of its income came from out-of-state. See pages 4-5, *supra.*

The House of Representatives is presently considering H.R. 3146, 100th Cong., 2d Sess. (1988), known as the Lottery-Advertising Clarification Act of 1988, which would expand the exemption in 18

lotteries, Section 1302 reduces the threat of organized criminal involvement in gambling activities. App., *infra*, 8a-11a. The statute therefore advances principles of federalism and protects the welfare of the citizens of those states that have declared that private lotteries are against public policy. Both goals are legitimate interests for Congress to advance through federal law. See *South Carolina* v. *Baker*, No. 94, Orig. (Apr. 20, 1988), slip op, 5-7; *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, slip op. 11-12; *Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 550-554 (1985). The mailing restrictions directly promote those interests, because the states lack authority to regulate the mails. App., *infra*, 12a. Finally, the mailing restrictions are not unduly burdensome. Publications, including newspapers, are not forbidden from publishing commercial lottery advertisements or lists of lottery prizes; they simply may not use the mails if they do so.

This Court's recent decision in *Posadas de Puerto Rico Assocs.* v. *Tourism Co., supra*, also supports the constitutionality of Section 1302. In that case, this Court upheld over a First Amendment challenge regulations limiting the commercial advertising of casino gambling to nonresidents of Puerto Rico, even though casino and other gambling acitivities were legal in that jurisdiction. The Court found that Puerto Rico had a legitimate interest in restricting commercial gambling advertising in order to safeguard the moral well-being of its citizens, and to prevent both corruption and the infiltration of organized

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U.S.C. 1307 to include materials promoting a lottery that is "authorized or not otherwise prohibited by law in the State in which it is conducted." H.R. Rep. 100-557, 100th Cong., 2d Sess. Pt. 1, at 1 (1988); see 134 Cong. Rec. H3073-H3079, H3102-H3103 (daily ed. May 10, 1988).

crime. Slip op. 11-12. Moreover, the Court ruled that restricting commercial advertising was a reasonable means of advancing those interests, because the goverment could reasonably believe that commercial casino advertising would enhance the demand for casino gambling. *Id.* at 12. The regulations were also tailored to Puerto Rico's interest in protecting the welfare of its citizens. *Id.* at 14-15. Finally, the Court held that, because Puerto Rico could ban gambling altogether, Puerto Rico could instead take the less restrictive step of restricting commercial advertising about that activity. *Id.* at 16.

The same analysis is appropriate here. Participating in a lottery, like any other form of gambling, is not a constitutionally protected activity. The federal government and the states can prohibit that activity entirely. *E.g., Posadas,* slip op. 16; *Champion* v. *Ames (Lottery Case),* 188 U.S. at 356-358; *In re Rapier,* 143 U.S. at 134; *Stone* v. *Mississippi,* 101 U.S. 814, 821 (1879). For much of our history, the states did just that. Section 1302 therefore reasonably and directly promotes the type of interests that this Court found legitimate in *Posadas.* The district court's decision to invalidate the prize list clause in its entirety erroneously denies Congress the authority to bar from the mails a narrow category of commercial speech that plays a direct and integral role in the conduct of an activity that Congress and the states are entitled to discourage or suppress.

3. The district court's permanent injunction against further enforcement of the prize list clause also conflicts with this Court's decisions in *Ex parte Jackson, supra,* and *In re Rapier, supra.* In *Ex parte Jackson,* the Court held that a person could be prosecuted under the Act of July 12, 1876, for depositing in the mails a letter containing a circular offering prizes in a lottery. In so ruling, the Court rejected a claim that the Act violated the First Amendment, holding that "the object of Congress has not been to

interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals." 96 U.S. at 736. Similarly, the Court upheld the Anti-Lottery Act of 1890 over a First Amendment claim in *In re Rapier, supra.* In that case, two defendants were convicted for sending through the mails a newspaper containing an advertisement and a circular about the Louisiana Lottery. Relying on *Ex parte Jackson, supra,* the Court rejected the claim that the Act violated the First Amendment, concluding that "[t]he circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people." *In re Rapier,* 143 U.S. at 134. Accord *Horner* v. *United States (No. 1),* 143 U.S. 207, 213 (1892); *Horner* v. *United States (No. 2),* 143 U.S. 570, 578 (1892) (relying on *In re Rapier).* The district court's ruling directly conflicts with this Court's decisions in the *Rapier* and *Jackson* cases. In fact, the district court acknowledged that its ruling was inconsistent with *Rapier.* App., *infra,* 15a.

Moreover, in cases decided after *Jackson* and *Rapier* that involved schemes to defraud the public, the Court has upheld the constitutionality of two related statutes that also date from the era of the Anti-Lottery Act of 1890: 39 U.S.C. 3005 and 3007, which authorize the Postal Service to initiate administrative and judicial proceedings in order to intercept reply mail induced by a fraudulent scheme. *Public Clearing House* v. *Coyne,* 194 U.S. 497, 505-516 (1904) (relying on *In re Rapier); Donaldson* v. *Read Magazine,* 333 U.S. 178, 189-191 (1948) (relying on *Coyne*); *Lynch* v. *Blount,* 404 U.S. 1007 (1972), aff'g 330 F. Supp. 689 (S.D.N.Y. 1971) (three-judge court) (39 U.S.C. 3005); *Outpost Dev. Corp.* v. *United States,* 414 U.S. 1105, aff'g 369 F. Supp. 399 (C.D. Cal. 1973) (three-

judge court) (39 U.S.C. 3005, 3007). The Third, Fifth, and Ninth Circuits have also upheld the constitutionality of this enforcement mechanism. *United States Postal Service* v. *Athena Products, Ltd.*, 654 F.2d 362 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 915 (1982) (both sections); *United States Postal Service* v. *Beamish*, 466 F.2d 804, 806-807 (3d Cir. 1972) (Section 3007); *Hollywood House Int'l, Inc.* v. *Klassen*, 508 F.2d 1276 (9th Cir. 1974) (Section 3005). See also *Original Cosmetics Products, Inc.* v. *Strachan*, 459 F. Supp. 496 (S.D.N.Y. 1978), aff'd, 603 F.2d 214 (2d Cir.) (Table), cert. denied, 444 U.S. 915 (1979) (Section 3005). As the Fifth Circuit explained in 1981, the Court's recent commercial speech decisions do not undermine the validity of these statutory provisions. *United States Postal Service* v. *Athena Products, Ltd.*, 654 F.2d at 366-368.[26] Sections 3005 and 3007 also apply

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[26] The decision below is also inconsistent with the decisions of the Second and Third Circuits with respect to the constitutionality of 18 U.S.C. 1304, which prohibits broadcasting information about lotteries. The Second Circuit in *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (1969), cert. denied, 396 U.S. 1061 (1970), upheld the constitutionality of the statute as applied to information directly promoting a state-conducted lottery. Although the Third Circuit in *New Jersey State Lottery Comm'n* v. *United States*, 491 F.2d 219 (1974) (en banc), dismissed as moot, 420 U.S. 371 (1975), held that Section 1304 would be unconstitutional if it were applied to prohibit the broadcasting of a winning lottery number in a lawful state-conducted lottery, the court held that the statute could constitutionally be applied to compensated broadcasts, and possibly to some uncompensated promotional advertisements beyond the context of broadcast journalism. 491 F.2d at 224. This Court granted certiorari to review the Third Circuit's decision, but later ordered the case dismissed as moot after Congress enacted 18 U.S.C. 1307, which exempts state-run lotteries from Section 1304. *United States* v. *New Jersey State Lottery Comm'n*, 420 U.S. 371 (1975).

The district court's ruling in this case invalidating the prize list clause in Section 1302 goes well beyond the decisions of the Second

to lotteries, and, for the reasons discussed above, the application of those statutes to commercial speech does not violate the First Amendment.

Given this extensive contrary authority, the district court's judgment invalidating in its entirety the prize list clause clearly presents a substantial federal question that should be resolved by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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and Third Circuits. The district court determined that the prize list clause in Section 1302 is invalid because it applies to such lists reported in news stories, but the judgment entered by the district court invalidated the prize list clause in its entirely. App., *infra*, 21a-22a. Under the district court's judgment, the Postmaster could not apply the prize list clause to any type of publication, including circulars prepared and disseminated by the sponsors of an illegal numbers racket. Both the Second and Third Circuit decisions noted above, however, would uphold Section 1302 if it was applied in that manner. The decision below therefore is also inconsistent with the decisions of the Second and Third Circuits in the lottery broadcasting cases.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC., PLAINTIFF

v.

POSTMASTER GENERAL OF THE UNITED STATES, UNITED STATES POSTAL SERVICE, AND UNITED STATES OF AMERICA, DEFENDANTS

[December 31, 1987]

MEMORANDUM AND ORDER

This matter comes before the court on the parties' cross-motions for summary judgment. At issue is the constitutionality of certain federal statutes and postal regulations which criminalize the mailing of advertisements or prize lists for lotteries or similar enterprises. Plaintiff Minnesota Newspaper Association ("MNA") contends that the statutes, primarily 18 U.S.C. § 1302 (1982), violate the constitutional standards of free speech and press, and equal protection. Defendant Postmaster General contends that the statutes and related regulations satisfy the standards set out in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). For the reasons stated below, the court grants partial summary judgment for MNA and partial summary judgment for the Postmaster. The challenged statutes are constitutional with respect to advertisements. However, the Postmaster has failed to establish a compelling governmental interest justifying the content-based restrictions on the mailing of prize lists.

FACTS

Minnesota law allows, subject to extensive regulation, nonprofit charitable organizations to operate gaming ac-

tivities for fund raising purposes. Minn. Stat. §§ 349.11-.60 (1986 & Supp. 1987). The primary games are bingo, pull tabs, raffles, paddle wheels, and tip boards. These organizations are free to use any form of advertising which does not involve mailing or broadcast.[1]

Plaintiff MNA is the chief representative of the organized newspaper press in Minnesota. MNA's member newspapers distribute a significant portion of their circulation through the United States mails. This dependence on the mails has forced newspapers to reject advertisements from charitable and nonprofit organizations wishing to publicize gaming activities. Such advertisements would run afoul of the restrictions contained in 18 U.S.C. § 1302[2] and 39 U.S.C. §§ 3001[3] and 3005[4].

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[1] 18 U.S.C. § 1304, which is not at issue here, prohibits the broadcast of advertisements or information concerning lotteries or similar enterprises.

[2] 18 U.S.C. § 1302 provides in relevant part:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> . . . .
>
> Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot of chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;
>
> . . . .
>
> Shall be fined no more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

[3] 39 U.S.C. § 3001 provides in relevant part:

> (a) Matter the deposit of which in the mails is punishable under section 1302 . . . of Title 18 . . . . is nonmailable.

[4] 39 U.S.C. § 3005 provides in relevant part:

> (a) Upon evidence satisfactory to the Postal Service, that any

Newspapers have also withheld news reports on bingo games and similar lottery operations legally conducted in Minnesota by private organizations because of the confusion that surrounds the interpretation and application of these statutes. Some of MNA's members newspapers have published such advertisements or news reports, and have been threatened with sanctions by representatives of the Postal Service. The Postal Service has also asked MNA to notify its members that further publication would cause the Postal Service to take action against the offending newspapers.

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person . . . is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which –

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

(3) requires the person or his representative to cease and desist from engaging in any such . . . lottery, or gift enterprise.

(d) Nothing in this statute shall prohibit the mailing of (1) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery . . . .

ANALYSIS

MNA seeks declaratory and injunctive relief. Its members newspapers face the very real threat of prosecution and/or the loss of mailing privileges. MNA itself was asked to warn its members of the serious potential for sanctions.

The Postmaster does not dispute MNA's standing to challenge the constitutionality of 18 U.S.C. § 1302 and 39 U.S.C. § 3001. However, the Postmaster does contend that MNA lacks standing to challenge the constitutionality of 39 U.S.C. § 3005. This section authorizes the issuance of "stop mail" orders against parties who use the mails to conduct a lottery or similar enterprise. The Postmaster argues that § 3005 applies only to those who actually conduct lotteries. Therefore, since MNA and its members do not conduct lotteries, MNA lacks standing to challenge this statute.

The court rejects the Postmaster's argument. Subsection (d) of section 3005 specifically excepts newspapers which carry advertisements or information concerning state-conducted lotteries from the prohibitions of this section. The exception proves the rule. By implication, newspapers which carry advertisements or information concerning *private* gaming operations may be subject to the sanctions of § 3005. Such advertising is precisely the conduct at issue in MNA's suit. Therefore, MNA has standing to challenge 39 U.S.C. § 3005.

A. Statutory Background

The criminal statute at issue, 18 U.S.C. § 1302, provides that whoever knowingly deposits in the mails, among other things, a newspaper containing any advertisement of

a lottery[5] or similar enterprise, or containing a prize list for such lottery or enterprise, is subject to a fine of up to $1,000 and/or imprisonment up to two years for the first offense and up to five years for any subsequent offense.

This prohibition originated in 1890 as an amendment to certain statutes relating to lotteries. 26 Stat. 465. *See also* Act of Mar. 4, 1909, Ch. 321, § 213, 35 Stat. 1129. The constitutionality of this section was upheld in *In re Rapier*, 143 U.S. 110 (1892). The Court based its decision on the authority of Congress to establish a postal system. U.S. Const. Art. 1, § 8, cl. 7. That authority includes the power to designate what may and may not be carried in the mails. *Id.* at 133.

Though the exercise of Congress' postal power through the legislation restricted lotteries, the Court did not "regard the right to operate a lottery as a fundamental right . . . ." *Id.* at 134. The Court also held that the legislation did not abridge the freedom of the press. "The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people." *Id.*

The Supreme Court has recently reiterated the broad scope of the Article I postal power. *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 126 (1981). "The power possessed by Congress embraces the regulation of the entire Postal System of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be

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[5] A lottery, gift enterprise, or similar scheme has three essential elements: (1) the distribution of prizes; (2) according to chance; (3) for consideration. *Federal Communication Comm'n v. American Broadcasting Co.*, 347 U.S. 284, 290 (1954). For purposes of this opinion, the term "lottery" includes all games of chance for which the plaintiff's members may not mail advertisements or prize lists.

excluded." *Id.* (quoting *Ex parte Jackson*, 96 U.S. 727, 732 (1878)). However, the Court in *Greenburgh* noted that this power "may not . . . be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution." *Id.*

This court must determine whether, in light of the developments in constitutional, particularly First Amendment, jurisprudence over the past century, the statutes at issues impermissibly infringe on the rights of freedom of speech and of the press, or equal protection.

B. Freedom of Speech and Press

The definition of commercial speech is central to this analysis. 18 U.S.C. § 1302 prohibits the mailing of publications containing, first, advertisements of a lottery or similar enterprise, and, second, lists of prizes for a lottery or similar enterprise. The categorization, commercial or noncommercial speech, of advertisements or prize lists will determine the defendant's burden in justifying these restrictions.

Commercial speech is entitled to First Amendment protections, though less extensive than those afforded to noncommercial speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). If commercial, the Postmaster must satisfy the standards of *Central Hudson*, 447 U.S. 557. If noncommercial, the Postmaster faces the almost impossible task of justifying the restriction. *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987).

The Eighth Circuit, in *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984), defined commercial speech as "speech which does 'no more than propose a commercial transaction,' or that 'relate[s] solely to the economic interests of

the speaker and its audience.' " *Id.* at 1277 (citation omitted). The Seventh Circuit noted, in *Woods v. Evansville Press Co.*, 791 F.2d 480, 484 (7th Cir. 1986), that "the term 'commercial speech' has predominantly been used in the first amendment context to describe commercial advertising."

1. Advertisements

Most advertisements fall squarely within the definition of commercial speech. A vendor purchases publication space in order to propose a business transaction. The charitable organization which sponsors a lottery has a similar motive. It wants its audience to know that for a sufficent consideration and with a sufficient amount of luck, they may realize a more than sufficient return. The advertisement touches the economic interests of both speaker and audience.

The Supreme Court, in *Central Hudson*, established a four-step analysis for commercial speech. In order to receive First Amendment protection, the speech:

> at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than necessary to serve that interest.

Central Hudson, 447 U.S. at 566.

Under the *Central Hudson* test, then, the dissemination of truthful commercial information about a lawful activity can be restricted if it is misleading, or if the government has a substantial interest, directly advanced, and the restriction is not more extensive than necessary.

a. Lawful activity, not misleading

The advertising which MNA's members desire to publish would concern lawful gaming enterprises. The Postmaster contends, though, that such advertising is deceptive and misleading if it does not reveal the odds against winning. As such, it is not entitled to the protections of the commercial speech doctrine.

Such disclosure is not required in order to include lottery advertisements within the protections of *Central Hudson*. Long odds are inherent in lotteries, and the public knows that. These are, after all, games of chance. Because the speech is not inherently misleading, the government must satisfy the final three steps of *Central Hudson*.

b. Substantial governmental interest

The governmental interests advanced by the restrictions on lottery advertisements must be substantial. The Postmaster argues, first, that the restrictions protect the policies of nonlottery states. Those states which prohibit lotteries have made a policy choice to restrict participation in gaming activities. Within the borders of each of these states this is unquestionably a substantial interest. *See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico,* 106 S. Ct. 2968, 2977 (1986) (legislature's interest in health, safety, and welfare of its citizens is substantial).

The issue then becomes whether Congress has a substantial interest in protecting those policies. Congress has an interest in exercising its postal power in a manner which allows individual states to make policy choices within the areas that have been reserved to the states. The regulation of lotteries traditionally has been left to the states. Because individual states have no authority to regulate the U.S.

mail,[6] nonlottery states would have no effective means to implement their gaming policy without the prohibitions at issue here. Removing these prohibitions would also undermine the policies of those states which have chosen to allow only limited types of gaming. This latter group of states would have no effective means to implement their limiting policy.

The Supreme Court, in upholding a statute which prohibited the interstate transport of lottery tickets, commented that Congress decided "that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce." *Champion v. Ames*, 188 U.S. 321, 357 (1903). *Accord United States v. Stuebben*, 799 F.2d 225, 229 (5th Cir. 1986).

In response, MNA contends that any federal concern for the policies of nonlottery states is decimated by the exception contained in 18 U.S.C. § 1307.[7] This section allows newspapers to carry advertisements, prize lists and information concerning a state-conducted lottery if the

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[6] *See United States Postal Serv. v. Brennan*, 574 F.2d 712, 714 (2d Cir. 1978) (only limits on postal power are those prescribed in the Constitution), *cert. denied*, 439 U.S. 115 (1979). *See also Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975) (state cannot prohibt local advertising of out of state services which are legal in the advertisers' state); and *State ex inf. Danforth v. Reader's Digest Ass'n, Inc.*, 527 S.W.2d 355 (Mo. 1975) (en banc) (state lottery statute does not interfere with federal postal power).

[7] 18 U.S.C. § 1307 provides in relevant part:

> (a) The provisions of section[] . . . 1302 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—
>
> (1) contained in a newspaper published in that State or an adjacent State which conducts such a lottery . . . .

newspaper is published in that state, or in adjacent state which also has a state-conducted lottery.

This is a narrow exception. The section is limited to advertisements for state-conducted lotteries and only in newspapers published within states conducting such lotteries. The exception does not affect newspapers in nonlottery states. The section is consistent with the congressional interest in refusing to use the postal power to undermine the policies of nonlottery states.

MNA also contends that the statutes make no distinction between lawful and unlawful lotteries. In other words, once a state permits private lotteries, Congress should be divested of authority to prohibit the mailing of advertising for those lotteries. The Supreme Court addressed a similar argument from a petitioner seeking to have his obscenity conviction overturned. The Court held that "the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails . . . to be used for the purpose of sending obscene material into the permissive State." *Smith v. United States*, 431 U.S. 291, 307 (1977). So, too, the state's right to permit private lotteries does not create a right to use the mails to advertise those lotteries.

The challenged restrictions on the mailing of lottery advertisements comport with the principles of federalism by allowing the individual states to advance their own gaming policies. The restrictions also protect the substantial interests of the states in protecting the health, safety, and welfare of their citizens.

The Postmaster also argues that the prohibitions further a second substantial interest: the government's interest in restricting the interstate growth of private lotteries and reducing the threat of criminal involvement. This was the

primary purpose behind the original legislation. The Louisiana Lottery had become so pervasive that only action at the federal level could deal with it. That concern remains relevant and substantial. "With no guarantee from the states that undesirable elements would not profit as licensees, the enactment of these provisions [permitting the mailing of private lottery advertisements] would lead to criminal involvement in gambling." H.R. Rep. No. 1517, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7007, 7022 (letter from Assistant Attorney General W. Vincent Rakestram).

MNA argues that the highly regulated nature of lottery activity in states like Minnesota makes the Postmaster's concern with criminal involvement insignificant. However, because regulation of these matters is left to the states, the experience of those states which exercise extensive regulatory control over lotteries is not instructive on what would happen in other states. Indeed, the removal of the mailing restrictions in section 1302 may lead some states to liberalize their lottery regulations in order to encourage commerce.

Other statutes also militate against the reemergence of interstate private lotteries. The prohibition on advertising in section 1302 serves as a necessary complement to the other statutory provisions designed to hamper the growth of these lotteries. The Postmaster has demonstrated a substantial governmental interest in reducing the threat of criminal involvement in gaming activities.

c. Directly advanced

The Postmaster, in the last two steps of the *Central Hudson* analysis, must prove that Congress has chosen an appropriate means to accomplish the asserted interest. *Central Hudson*, 447 U.S. at 566. The challenged restric-

tions must directly advance that interest, and the restrictions can be no more extensive than necessary to serve that interest.

The prohibition on advertising keeps mailed advertising, which the states cannot regulate, out of those states which have determined that lotteries must be banned or highly regulated. The prohibitions directly advance the federal government's interest in protecting the policy choices of the individual states.

The restrictions also directly advance the government's interest in preventing the interstate growth of private lotteries. Advertising of private lotteries increases participation. If this were not so, the plaintiff would not be challenging these statutes because there would be no demand from lottery sponsors for newspaper advertising. Effective suppression of interstate private lotteries requires suppression of the advertising which would make such lotteries possible.

The plaintiff contends that the restrictions are ineffective because lottery sponsor shift their advertising to media which are not so restricted. One way or another, information on gaming opportunities reaches the public. This argument misses the point that the government's interest is not in squelching all lottery advertising, but in keeping that advertising, as much as possible, within the state of origin.

d. No more extensive than necessary

The court is also satisfied that the restrictions on advertising are no more extensive than necessary to serve the government's interest. MNA suggests that the government has several less restrictive options, notably disclaimers within the advertisement, and public education campaigns.

Counterspeech was not in vogue when the statutes at issue were enacted. However, the more recent experience with disclaimers in cigarette advertisements supports the conclusion that disclaimers and public service campaigns, while less extensive, would not effectively advance the stated interests.

The Supreme Court, addressing this argument in its *Posadas* decision, concluded that "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." *Posadas*, 106 S. Ct. at 2978.

In summary, the court concludes that the restriction on advertisements in 18 U.S.C. § 1302 passes the *Central Hudson* test.

2. Prize lists

Lists of prizes awarded, which are also prohibited by 18 U.S.C. § 1302, do not fit within the definition of commercial speech. Of course, a prize list contained within a lottery advertisement is commercial speech. A list of winners is an effective promotional device. A lottery sponsor would include such a list in order to encourage its audience to participate in a commercial transaction—the lottery.

However, a prize list also has value as news. In the context of a news report, a prize list is truthful information about a public event. It is as noteworthy as the score of a ball game or the review of a play. An editor's decision to publish the list of winners from last night's bingo game is not an offer by the newspaper to engage in a commercial transaction. It is simply news.

Prize lists have no inherent claim to First Amendment protection. It is the context of the prize list, in advertisement or news reports, that determines the level of protection.

The court has already concluded that the government may restrict lottery advertising, and that includes advertisements containing prize lists. However, section 1302 was intended to cover more than prize lists within lottery advertisements. Prize lists are set out in the statute as a separate prohibited category, not a subset of advertisements. The statute was designed to restrict the publication or prize lists in news reports. The restriction on prize lists, therefore, directly infringes on noncommercial speech.

Noncommercial speech is entitled to the full measure of First Amendment protections. In order to justify the prohibition on prize lists, the Postmaster must show that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722, 1728 (1978). As the Supreme Court noted in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983), "this Court has sustained content-based restrictions [or noncommercial speech] only in the most extraordinary circumstances."

The commercial speech doctrine affords a limited measure of protection to commercial speech, and, accordingly, "modes of regulation that might be impermissible in the realm of noncommercial expression" will be allowed with respect to commercial expression. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Section 1302, because it applies the same prohibition to both commercial and noncommercial expression, treats unequals equally. What the court has found to be the government's substantial interest with respect to advertisement must now be found to be a compelling interest with respect to prize lists.

The restriction on publishing prize lists acts as a restraint on the editorial decision making process. "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly

and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *First Natl. Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940)). The interests here asserted do not justify imposing the fear of subsequent punishment on an editor who decides to publish a lottery prize list. "The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . . ." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The Postmaster has not established a compelling interest justifying the prohibition in 18 U.S.C. § 1302 on the mailing of prize lists. This section of the statute is, therefore, an impermissible infringement on First Amendment rights. The court need not reach the issue of whether the restriction is narrowly drawn.

This court's holding regarding prize lists is inconsistent with the Second Circuit's opinion in *New York State Broadcasters Ass'n v. United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970). There the court held that the FCC could prohibit the broadcast of information directly promoting a lottery. *Id.* at 998. The court did not require the finding of a compelling interest to justify this content-based restriction. This is precisely the finding which this court was required to make, concluding that such an interest had not been proven.

This court's holding regarding prize lists is also inconsistent with the Supreme Court's decision in *In re Rapier*, 143 U.S. 110 (1892), which held that entire statute constitutional. However, First Amendment decisions such as *Near v. Minnesota*, 283 U.S. 697 (1931), and its progeny, direct courts to resist governmental interference with the news gathering function.

3. News reports and editorials

MNA has asserted that its member newspapers have withheld news coverage and editorial comment on lotteries because of the confusion that surrounds the interpretation and application of these prohibitions.

Because section 1302 is a penal statute, it must be strictly construed. *Federal Communication Comm'n v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954). The statute is, by its language, limited to advertisements and prize lists. It cannot be construed to extend to general news reports or editorial comment. Accordingly, this court holds that section 1302 does not authorize the exclusion from the mails of newspapers containing general news reports or editorial comment regarding lotteries.

4. Severability

The proper analysis to be followed in determining the issue of severability is well established. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 107 S. Ct. 1476, 1480 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). A statute is presumed severable if what remains is fully operative as law.

The provisions of section 1302 apply to two items, advertisement and lists of prizes drawn. The court has held the prohibition affecting prize lists invalid. This holding in no way undermines the functioning of the prohibition on lottery advertisements. That segment remains fully operative. Therefore, the language of section 1302 covering prize lists is severed from the statute and the provisions dealing with advertisements remain in effect.

C. Equal Protection

MNA argues that the classification scheme embodied in section 1302 and related statutes is arbitrary, irrational, and violates the principles of equal protection. MNA contends that newspapers are not treated the same as those advertising media that do not use the mails or airwaves. MNA also asserts that the restrictions discriminate against smaller lottery sponsors which are least able to afford alternate forms of advertising.

Equal protection "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). MNA seems to be presenting two sets of similarly situated groups which are being treated differently. The first is advertising media. Newspapers, along with the broadcast media, because of their dependence on interstate commerce, are treated differently than other media. Second, MNA suggests that lottery sponsors are affected differently by the restrictions.

Before addressing these concerns, the court must determine the appropriate standard of review. MNA contends that strict scrutiny is proper because the statutes infringe on personal rights protected by the Constitution. The Fifth Circuit addressed this issue in *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), and concluded that strict scrutiny was not appropriate. "[P]arties cannot insist on strict scrutiny merely by asserting a First Amendment right that the court ultimately finds not to be violated." *Id.* at 752.

This court has held that the restrictions on lottery advertising (which, from the plaintiff's perspective, are the only prohibitions still at issue) are constitutional. Because the advertising restrictions in Section 1302 do not violate any fundamental rights, strict scrutiny is not the proper stand-

ard. Accordingly, the court must determine whether the statutes are rationally related to a legitimate state interest.

MNA contends, as noted above, that newspapers are treated differently than those media which do not use interstate commerce. This is a weak argument. Congress has been consistent in prohibiting advertising for lotteries in those media which it regulates – those using the means of interstate commerce. The tenets of equal protection are not violated because other media, beyond Congress' authority, are not similarly regulated. "[I]t is a reasonable ground of classification that a state has power to legislate with respect to persons in certain situations and not with respect to those in a different one." *Id.* at 753 (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)). The federal government has a legitimate interest in protecting the policies of the individual states with regard to lotteries. As noted above, that interest is directly advanced by the restrictions.

The plaintiff's contention that this regulatory scheme is riddled with inconsistencies has already been addressed. The exception in section 1307 for state-conducted lotteries is narrow. Newspapers in those states can publish advertising and information related to the state-conducted lotteries only. They are not free to publish advertisements for a private lottery because of that exception. Section 1307 represents a reasonable balancing of the interests of those states which conduct lotteries with the concerns of those states which do not.

Second, MNA has asserted that the restrictions discriminate unfairly against less prosperous lottery sponsors which cannot afford alternate forms of advertising. The court notes, first, that these lottery sponsors are not parties in this action. MNA has not asserted that it has standing to argue the claims of these third parties. Nonetheless, the court will address this issue.

The plaintiff's assertions go to the discriminatory impact of these statutes. MNA has not argued that the statutes were promulgated with the intent to discriminate against less prosperous lottery sponsors. If the statutes do have the asserted impact, and no facts are in the record to indicate such, the plaintiff's argument is flawed because MNA no where suggests the existence of a discriminatory intent. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977).

D. 39 U.S.C. §§ 3001 and 3005

Section 3001 provides, *inter alia*, that matter which is punishable under 18 U.S.C. § 1302 is nonmailable. This provision must be applied consistent with the court's holding on 18 U.S.C. § 1302.

Section 3005 is a broadly worded provision which has remained in the background of this suit. The court simply directs that this section shall not be enforced in a manner which is inconsistent with the court's holding on 18 U.S.C. § 1302. In other words, section 3005 shall not be applied to prevent the mailing of newspapers containing news reports on lotteries, including news reports containing prize lists, or editorial comment on lotteries.

CONCLUSION

The restriction in 18 U.S.C. § 1302 on the mailing of lottery advertisements is constitutional under the standards set out in *Central Hudson*. The restriction on the mailing of lists of prizes does not survive constitutional scrutiny because the government has not established the compelling interest necessary to justify this content-based prohibition. The statute, strictly construed, does not apply to news reports or editorials. Finally, the restriction on lot-

tery advertising does not offend the principles of equal protection.

Accordingly, IT IS ORDERED that:

1. The motion of defendant Postmaster General for summary judgment is PARTIALLY GRANTED and the motion for plaintiff MNA is PARTIALLY DENIED. The court declares that the restriction in 18 U.S.C. §§ 1302 on the mailing of advertisements for lotteries is constitutional and fully enforceable.

2. The motion of plaintiff MNA for summary judgment is PARTIALLY GRANTED and the motion of defendant Postmaster General is PARTIALLY DENIED. The court declares that the restrictions in 18 U.S.C. § 1302, and its implementing regulations, on the mailing of lists of prizes awarded from a lottery are unconstitutional. The defendant is permanently enjoined from further enforcement of the restrictions on prize lists.

3. The motion of defendant Postmaster General to strike affidavits is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 31, 1987

/s/ PAUL A. MAGNUSON
Paul A. Magnuson
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CV 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC.,

v.

POSTMASTER GENERAL OF THE U.S.,
U.S. POSTAL SERVICE, U.S.A.

Judge MAGNUSON

[January 6, 1988]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the motion of deft. Postmaster General for summary judgment is Partially Granted and the motion of Pltf. MNA is PARTIALLY DENIED; the motion of pltf. MNA for summary judgment is Partially Granted and the motion of deft. Postmaster General is Partially Denied; the deft. is permanently enjoined from further enforcement of the

restrictions on prize lists; the motion of deft. Postmaster General to strike affs. is denied.

Date: 1-6-88

Francis E. Dosal
Clerk

Pat Kegley
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC., PLAINTIFF

v.

POSTMASTER GENERAL OF THE UNITED STATES, UNITED STATES POSTAL SERVICE, AND UNITED STATES OF AMERICA, DEFENDANTS

[Filed January 28, 1988]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Postmaster General of the United States, the United States Postal Service, and the United States of America, the defendants in the above-captioned case, hereby appeal to the Supreme Court of the United States from the final judgment of the United States District Court for the District of Minnesota, holding 18 U.S.C. § 1302 in part unconstitutional on December 31, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

JEROME G. ARNOLD
United States Attorney

LYNN A. ZENTNER
Assistant United States Attorney

Of Counsel:

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/s/ THEODORE C. HIRT
THEODORE C. HIRT

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Counsel for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC., PLAINTIFF

v.

POSTMASTER GENERAL OF THE UNITED STATES, UNITED STATES POSTAL SERVICE, AND UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT OF SERVICE

I hereby declare under penalty of perjury under the laws of the United States of America that service of defendants' Notice Of Appeal To The Supreme Court Of The United States has been made upon plaintiff by mailing by DHL delivery a copy thereof to:

Mark R. Anfinson, Esq.
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408

on this 27th day of January, 1988.

Such service is made in compliance with Supreme Court Rule 28.5(c).

/s/ C. GAIL WALKER
C. GAIL WALKER

Sworn and subscribed to before me this 27th day of January, 1988.

/s/ ALICE FAY PRINCE
NOTARY PUBLIC

My Commission Expires August 14, 1989.

APPENDIX D

1. Article I, § 8, Cl. 7 of the Constitution of the United States provides, in relevant part, as follows:

> The Congress shall have Power * * * To establish Post Offices and Post Roads.

2. The First Amendment to the Constitution of the United States provides, in relevant part, as follows:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

3. 18 U.S.C. 1301 provides as follows:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift, enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

4. 18 U.S.C. 1302 provides as follows:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title—

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

5. 18 U.S.C. 1303 provides as follows:

Whoever, being an officer or employee of the Postal Service, acts as agency for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift

enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than $100 or imprisoned not more than one year, or both.

6. 18 U.S.C. 1307 provides as follows:

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—

(1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or

(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—

(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wager on sporting events or contests.

7. 39 U.S.C. 3001(a) provides, in relevant part, as follows:

Matter the deposit of which in the mails is punishable under section 1302 * * * of title 18 * * * is nonmailable.

8. 39 U.S.C. (& Supp. III) 3005 provides as follows:

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, including the mailing of matter which is nonmailable under section 3001(d) of this title, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which—

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payments by a postmaster to the person or his representative of any money order

or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note; and

(3) requires the person or his representative to cease and desist from engaging in any such scheme, device, lottery, or gift enterprise.

For purposes of the preceding sentence, the mailing of matter which is nonmailable under such section 3001(d) by any person shall constitute prima facie evidence that such person is engaged in conducting a scheme or device for obtaining money or property through the mail by false representations.

(b) The public advertisement by a person engaged in activities covered by subsection (a) of this section, that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency in any other legal way satisfactory to it.

(c) As used in this section and section 3006 of this title, the term "representative" includes an agent or representative acting as an individual or as a firm, bank, corporation, or association of any kind.

(d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery, (2) tickets or other materials concerning such a lottery within that State to addresses within that State, or (3) an advertisement promoting the sale of a book or

other publication, or a solicitation to purchase, or a purchase order for any such publication, if (A) such advertisement, solicitation, or purchase order is not materially false or misleading in its description of the publication; (B) such advertisement, solicitation, or purchase order contains no material misrepresentation of fact: *Provided, however,* That no statement quoted or derived from the publication shall constitute a misrepresentation of fact as long as such statement complies with the requirements of subparagraphs (A) and (C); and (C) the advertisement, solicitation, or purchase order accurately discloses the source of any statements quoted or derived from the publication. Paragraph (3) shall not be applicable to any publication, advertisement, solicitation, or purchase order which is used to sell some other product in which the publisher or author has a financial interest as part of a commercial scheme. For the purposes of this subsection, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(e)(1) In conducting an investigation to determine if a person is engaged in any of the activities covered by subsection (a) of this section, the Postmaster General (or any duly authorized agent of the Postmaster General) may tender, at any reasonable time and by any reasonable means, the price advertised or otherwise requested for any article or service that such person has offered to provide through the mails.

(2) A failure to provide the article or service offered after the Postmaster General or his agent has tendered the price advertised or otherwise requested in the manner described in paragraph (1) of this

subsection, and any reasons for such failure, may be considered in a proceeding held under section 3007 of this title to determine if there is probable cause to believe that a violation of this section has occurred.

(3) The Postmaster General shall prescribe regulations under which any individual seeking to make a purchase on behalf of the Postal Service under this subsection from any person shall—

(A) identify himself as an employee or authorized agent of the Postal Service, as the case may be;

(B) state the nature of the conduct under investigation; and

(C) inform such person that the failure to complete the transaction may be considered in a proceeding under section 3007 of this title to determine probable cause, in accordance with paragraph (2) of this subsection.

9. Section 123.42 of the Domestic Mail Manual (1988) provides as follows:

.42 Lottery Matter (18 U.S.C. 1302)

.421 Any scheme or promotion, whether or not lawful under the laws of any state, which, upon payment of consideration, offers a prize dependent in whole or in part upon lot or chance, is a lottery.

.422 The following matter is unlawful mail matter:

a. Any letter, package, postal card, or circular which advertises, invites or otherwise permits or facilitates participation in a lottery.

b. Any lottery ticket or part thereof or substitute.

c. Any form of payment for a lottery ticket or share.

d. Any newspaper, circular, pamphlet, or publication of any kind containing any advertising of a lottery or similar enterprise, or any list of prizes awarded in such an enterprise.

.423 This section does not apply to any fishing contest not conducted for profit, wherein prizes are awarded for the species, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event (18 U.S.C. 1305).

.424 This section does not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of its law contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or to the mailing to addresses within a State of tickets or other material concerning a lottery conducted by that State under the authority of its law (18 U.S.C. 1307).

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No. 87-1956

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,
v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.,
Appellee.

On Appeal from the United States District Court for the District of Minnesota

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MOTION OF APPELLEE MINNESOTA NEWSPAPER ASSOCIATION, INC. TO AFFIRM

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June 27, 1988

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RULE 28.1 LISTING

Appellee Minnesota Newspaper Association, Inc. has no parent companies, subsidiaries, or affiliates within the contemplation of Supreme Court Rule 28.1.

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MOTION OF APPELLEE MINNESOTA NEWSPAPER ASSOCIATION, INC. TO AFFIRM

Pursuant to Rule 16.1, appellee Minnesota Newspaper Association, Inc. moves to affirm that portion of the decision of the United States District Court for the District of Minnesota from which appellants have taken their appeal. The basis for appellee's motion is that the question presented is so unsubstantial as not to need further argument.

STATEMENT

Section 1302, para. 5 of Title 18 prohibits the mailing of various publications, including newspapers, that contain advertisements which might promote lotteries and other games of chance. A separate clause of the same

section also makes it a crime to publish "any list of the prizes drawn or awarded" with respect to such games.

As part of its decision below, the District Court held that this restriction on the publication of prize lists was facially invalid under the First Amendment.

(The District Court also ruled that § 1302 and related provisions of federal law were not unconstitutional to the extent they barred the dissemination of advertising about such games, even where the games were legal under state law. That portion of the District Court's decision has been separately appealed by appellee herein as No. 87-1943.)

In reaching its decision, the District Court reasoned that a prize list published as part of an advertisement would be subject to the advertisement clause of the statute, and so could be validly restricted without reference to the prize list clause. The Court therefore concluded that the separate prize list clause might well be intended to apply to nonadvertising materials. As a result, it must satisfy the higher standard of review appropriate for noncommercial speech. The District Court then determined that the prize list clause did not meet that standard, and was therefore invalid.

ARGUMENT

Section 1302 contains a prohibition on lottery advertising, and a separate and independent prohibition that applies to prize lists. In the context of newspapers, a prize list that is part of a paid advertisement could obviously be considered commercial speech. But such a list would then be governed by the advertising clause of the statute, according to the District Court. So either the prize list clause is redundant, or it has some other purpose. Nothing in the text of the statute itself indicates redundancy, since the language of the prize list clause is without limitation.

The District Court therefore reasonably concluded that the prize list clause could well be interpreted to extend to noncommercial (i.e., news and editorial) publications of the lists. And if prize lists may also be news, the District Court correctly held that the commercial speech rules do not apply.

Where a newspaper desires to publish a prize list, without remuneration from the sponsor of the particular game, its decision to publish involves news and editorial judgment, and it is therefore entitled to the full measure of First Amendment protection. In order to justify any restriction on such a publication, the government must show the restriction is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Arkansas Writer's Project, Inc. v. Ragland*, 107 S. Ct. 1722, 1728 (1987). Content-based restrictions on noncommercial speech have been sustained "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983).

A statutory restriction on publishing prize lists, apart from cases where the publisher is compensated by the promoter, acts as a restraint on the editorial decision making process. "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *First Natl. Bank v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940).

Appellants claim to identify a "fatal flaw" in the District Court's reasoning. They assert that the District Court incorrectly assumed that commercial speech is basically the same as advertising, and that in reality, various types of nonadvertising matter are also included within the definition of commercial speech. They suggest that prize lists might be one instance of this, in certain situations. Brief of Appellants, p. 12.

In support of this proposition, appellants argue that commercial speech is comprised of those forms of expression that do "no more than propose a commercial transaction" (citing *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 385 (1973)), and that advertising is but a subcategory of this type of expression. Brief of Appellants, p. 12. Although appellants do not proceed to define "advertising", they seem to assume that it refers simply to the publication of matter in exchange for a consideration.

In seeking to establish a distinction between commercial speech and advertising, appellants describe what they believe are some examples of nonadvertising publications of prize lists that should nonetheless be considered to be commercial speech: (1) The publication of a list of prizes by a newspaper where the newspaper expected to receive a share of the lottery's proceeds; (2) publication of the list where the newspaper itself sponsored the lottery; and (3) "if the newspaper were paid to publish a list of prizes, such a list should be regarded as commercial speech, because it would be speech about a commercial transaction that the newspaper had been directly paid to promote." Brief of Appellants, pp. 13-14.

Of the above-described examples cited by appellants, the first and third would almost certainly seem to fall within the definition of advertising in any case, and therefore no fine commercial speech distinctions are necessary in order to make them subject to the District Court's determination that they may be prohibited under § 1302. In both examples the newspaper receives consideration for the publication of the list.

Insofar as this appeal relates to the publication of prize lists in newspapers, appellants would therefore seem to be saying that under the District Court's decision, newspapers are able to promote their own lotteries (though solely by the publication of lists of prize win-

ners), and that this concern is of such magnitude as to justify further argument before this Court. Except for such publications, there would not appear to be any other situations that would not already be covered by the District Court's decision involving advertising prohibitions, at least as far as newspapers are concerned.

In response, appellee would simply note that newspaper sponsored lotteries are rather infrequent, that publication of the prize list alone (which is all the District Court decision permits) is hardly a major promotional tool, and that such a publication might well be defined as advertising anyway if the newspaper were sponsoring the lottery. In short, appellants' concerns are largely insignificant.

And not only are the commercial speech/advertising distinctions posed by appellants unsubstantial, but if recognized, they would cause great confusion among newspaper staffs about where exactly the line should be drawn between permissible and impermissible material, since appellants concede that some prize list publications are allowed. This would produce a deterrent effect that is constitutionally defective. The fear of subsequent punishment could chill many publications, and would thereby infringe on the discretion that the Constitution requires be left to the newspaper staff. "The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press. . . . " *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The District Court found that appellants had identified no compelling interests by which to sustain the prize list clause, and indeed appellants do not pretend there are any. They rely instead on the above-described "flaw" in the District Court's reasoning.

Appellee would submit that there is no such flaw, and that, with respect to its decision on the prize list clause of § 1302, the District Court was correct in its concerns about the statute infringing on the news and editorial discretion of newspapers.

CONCLUSION

The judgment of the District Court should be affirmed, as it relates to the prize list clause of § 1302.

Respectfully submitted,

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(4)

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No. 87-1956

In the Supreme Court of the Uni

OCTOBER TERM, 1988

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY MEMORANDUM FOR THE APPELLANTS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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REPLY MEMORANDUM FOR THE APPELLANTS

In our jurisdictional statement, we explained that the district court's judgment holding the prize list clause facially unconstitutional under the First Amendment expressly conflicts with this Court's decisions in *Ex parte Jackson*, 96 U.S. 727 (1878), and *In re Rapier*, 143 U.S. 110 (1892), both of which upheld predecessor versions of 18 U.S.C. 1302 over similar First Amendment challenges. We also explained that, under this Court's 1986 decision in *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, which upheld over a First Amendment challenge a restriction on the commercial advertising of casino gambling, the prize list clause is a valid restriction on the use of the mails for the purpose of promoting lotteries. Appellee[1]

[1] Although the appeal in this case has a higher docket number than the related appeal in No. 87-1943 taken by the Minnesota Newspaper Assocation, Inc., the government has also taken an appeal from the district court's judgment. We will therefore refer to the Association as the appellee to avoid confusion.

does not deny that the district court's decision conflicts with *Ex parte Jackson, supra*, and *In re Rapier, supra*, and appellee does not even cite (much less distinguish) this Court's closely-analogous decision in *Posadas de Puerto Rico Assocs.* v. *Tourism Co., supra*. Appellee has thus failed to offer a reason why this case does not warrant plenary review by this Court. Instead, appellee offers three reasons why the district court was correct. None is persuasive.

1. As we explained in our jurisdictional statement (at 11-18) the district court's judgment rests on an erroneous interpretation of 18 U.S.C. 1302. Congress enacted the prize list clause in order to prohibit the use of the mails for the commercial promotion of lotteries, not to inhibit public debate on their social or economic merits. Although appellee defends the district court's interpretation of the prize list clause, appellee's entire argument rests on the same mistaken premises. Mot. to Aff. 2-3. Like the district court, appellee believes that advertising is the only form of commercial speech. Moreover, because Section 1302 contains both an advertisement clause and a prize list clause, appellee believes that the prize list clause would be superfluous unless it applies to something other than noncommercial speech. As we have already shown, however, the Court's commercial speech decisions suggest that both premises are wrong: Commercial speech is not coterminous with advertising, and either the publication by a newspaper of a prize list for which it receives direct compensation or the publication by a newspaper of a prize list for a lottery conducted by the newspaper itself, should be regarded as forms of commercial speech, even though neither would be regarded as advertising. Because appellee's premises are wrong, its statutory construction argument necessarily fails.

2. Appellee claims (Mot. to Aff. 5) that the constitutionality of the prize list clause is "largely insignificant," since most prize lists are published as part of advertisements, and the district court upheld the advertisement clause in the statute. That contention, however, overlooks the fact that the district court held the prize list clause facially unconstitutional under the First Amendment in all its possible applications. J.S. App. 20a-22a. Thus, the district court's *judgment* goes far beyond prize lists that appear in newspaper advertisements or (as the district court erroneously thought was contemplated by the statute) legitimate news stories. It would also prohibit enforcement of the statute against prize lists sent through the mails in circulars, pamphlets, or "publication[s] of any kind" (18 U.S.C. 1302), including a flyer used in an illegal numbers racket. And as we have argued, it would prohibit enforcement of the statute against a newspaper that is engaged in the direct promotion of a lottery when that promotion takes the form of the paid publication of prize lists, rather than advertisements. Taken together, it is implausible to assert that these consequences of the district court's judgment are "insignificant." This Court recently made clear that a statute may not be held facially invalid under the First Amendment unless " 'every application of the statute create[s] an impermissible risk of suppression of ideas,' " or there is " 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the [c]ourt.' " *New York State Club Ass'n* v. *City of New York*, No. 86-1836 (June 20, 1988), slip op. 8 (citation omitted). When the prize list clause is properly construed, it may constitutionally be applied to regulate the distribution through the mail of commercial speech promoting lotteries without infringing the First Amendment rights of appellee or other parties. Because appellee has made no

effort to defend the district court's judgment, as opposed to its expression of concern about the possible (and in our view erroneous) application of the statute to news stories or editorials, that judgment clearly warrants plenary review by this Court.

3. Appellee contends (Mot. to Aff. 5) that the difficulty in distinguishing commercial speech from bona fide news stories will deter newspapers from publishing news stories about lotteries. That argument is implausible; a newspaper can easily tell whether it was paid to publish a prize list, or whether it will receive a share of a lottery's proceeds, or whether the newspaper is itself sponsoring a lottery. But even if appellee's argument had merit, it would only mean that courts should give the benefit of the doubt to articles that cannot be readily identified as commercial speech, rather than political speech. Appellee's argument does not require the Court to abandon the commercial speech doctrine altogether. This Court refused to do so two Terms ago in *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, *supra*, and appellee has given no reason why the Court should do so now.[2]

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[2] We observed in our jurisdictional statement (at 19-20 n.25) that the House of Representatives was considering a bill, known as the Lottery Advertising Clarification Act of 1988, that would expand the exemption in 18 U.S.C. 1307 to include materials promoting a lottery that is not illegal under state law. The House has now passed that bill, and it is currently before the Senate. We will, of course, keep the Court advised of any further progress on that bill and on what effect, if any, the bill would have on this case should it be enacted into law.

On June 27, 1988, the President signed into law Pub. L. No. 100-352. Although Section 1 of that law repealed 28 U.S.C. 1252, that repeal does not affect this case. Section 7 of the statute provides that it "shall take effect ninety days after the date of the enactment of this Act * * * [and] shall not apply to cases pending in the Supreme Court on the effective date * * * or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date."

It is therefore respectfully submitted that, for the foregoing reasons and those given in our jurisdictional statement, this Court should note probable jurisdiction over this appeal.[3]

CHARLES FRIED
Solicitor General

JULY 1988

[3] As we explained in our response to the jurisdictional statement in No. 87-1943, the Court should also note probable jurisdiction over that appeal and consolidate that case with this one.

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Nos. 87-1943 and 87-1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MINNESOTA NEWSPAPER ASSOCIATION, INC.,
Appellant,

v.

POSTMASTER GENERAL OF THE UNITED STATES, *et al.*,
Appellees.

ANTHONY M. FRANK, POSTMASTER GENERAL
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Appellants,

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.,
Appellee.

On Appeals from the United States District Court for the District of Minnesota

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BRIEF OF AMICI CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, BIG BROTHERS AND SISTERS OF SPOKANE COUNTY, KICKAPOO TRIBE IN KANSAS, NATIVE AMERICAN PRESS ASSOCIATION, AND VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF MINNESOTA NEWSPAPER ASSOCIATION, INC.

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Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) 7, 9, 12
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Smith v. United States, 431 U.S. 291 (1977) 11
Thornhill v. Alabama, 310 U.S. 88 (1940) 4
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 4, 6

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. I ..... *passim*

STATUTES:

18 U.S.C. § 1301 13
18 U.S.C. § 1302 13
18 U.S.C. § 1307 9
Act of June 8, 1872, ch. 335, § 149, 17 Stat. 283, 302 11

OTHER AUTHORITIES:

H.R. Rep. No. 2678, 49th Cong., 1st Sess. (1886) 11
S. Rep. No. 1579, 51st Cong., 1st Sess. (1890) 11
S. Rep. No. 537, 98th Cong., 2d Sess. (1984) 5, 6, 9, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 87-1943 and 87-1956

MINNESOTA NEWSPAPER ASSOCIATION, INC.,
Appellant,

v.

POSTMASTER GENERAL OF THE UNITED STATES, *et al.*,
Appellees.

ANTHONY M. FRANK, POSTMASTER GENERAL
OF THE UNITED STATES, *et al.*,
Appellants,

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.,
Appellee.

On Appeals from the United States District Court for the District of Minnesota

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BRIEF OF AMICI CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, BIG BROTHERS AND SISTERS OF SPOKANE COUNTY, KICKAPOO TRIBE IN KANSAS, NATIVE AMERICAN PRESS ASSOCIATION, AND VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF MINNESOTA NEWSPAPER ASSOCIATION, INC.

STATEMENT OF INTEREST

This brief is submitted on behalf of five amici curiae who include publishers of newspapers, news media serving the American Indian community, charitable organizations, and an Indian tribe.*

The American Newspaper Publishers Association ("ANPA") is a national trade association representing over 1,400 newspapers located primarily in the United States and Canada. Its membership constitutes approximately 90% of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. Virtually all ANPA members distribute some copies of their newspapers by mail and are therefore directly affected by the mailing prohibitions that are the subject of these appeals.

In addition, ANPA has a general interest, expressed on numerous occasions as amicus curiae in this Court, in the preservation of First Amendment protection for both news and advertising. This concern goes beyond an interest in publishing the specific news and advertising involved in these appeals; it is a general concern that government restrictions on the content and distribution of newspapers be subjected to the most careful scrutiny consistent with First Amendment principles enunciated by this Court.

The Native American Press Association ("NAPA") comprises approximately 90 members representing the newspaper, radio and television media serving the American Indian population in the United States. NAPA has a similar interest in these appeals to that of ANPA.

Big Brothers and Sisters of Spokane County, Veterans of Foreign Wars of the United States, and Kickapoo Tribe in Kansas are charitable organizations and an Indian tribe that conduct lawful gaming activities such as drawings, bingo and other games of chance as fundraising activities to support their social service programs.

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* Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 36.

The prohibition challenged on these appeals prevent them from using the mails to promote these entirely legal activities, even within their local communities. They are also effectively prevented from advertising in their local newspapers if any copies—even a minuscule percentage of the total circulation—will be mailed to subscribers. As a result, they are denied the two most cost-effective means of reaching potential participants and supporters of these legally sanctioned fundraising activities.

For all of the above-stated reasons amici support the position of appellant/appellee Minnesota Newspaper Association in these appeals.

FACTUAL BACKGROUND

The statutes under review purport to prohibit only the *mailing* of newspapers containing information about lotteries, but their effect goes much further. Because it is not feasible for most newspapers to recompose and reprint a "sanitized" version of the newspaper solely for mail delivery, the practical result of the prohibition is to ban lawful advertising of games of chance in *all* copies of the newspaper, even if the vast majority are home-delivered or sold in newsracks within the state and community where the games are lawful. Faced with the Hobson's choice of either refusing lottery advertising or losing their mail distribution, newspapers are forced to forego the advertising.

This indirect, yet substantial, effect of the restrictions is significant. It highlights the difference between the facts in this case and the facts involved in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), relied upon by the District Court as authority for upholding the advertising restrictions. In *Posadas* both the purpose and the effect of Puerto Rico's regulatory scheme was to prevent local casino advertising from reaching residents of Puerto Rico, while preserving the ability of casinos to reach out-of-state tourists, the intended audience of such advertising. In the present case the purpose of the mailing restriction, according to the District Court, is to prevent lottery information from

reaching the residents of states other than the state of origin, but the substantial effect is to bar dissemination of that information to its intended audience—residents within the state and community where the newspaper is published and the advertised activity is legal.

ARGUMENT

I. DISSEMINATION OF BOTH NEWS AND ADVERTISING SERVES THE PUBLIC'S INTEREST IN SELF-GOVERNMENT AND IS PROTECTED BY THE FIRST AMENDMENT

This Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) recognized the intrinsic value of purely commercial speech:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

More broadly, the Court has invariably recognized that the core purpose of the First Amendment is to protect dissemination of all information necessary for the public to address the full range of social problems confronting them. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

Information concerning gambling—both pure news and pure advertising—fulfills both of these functions. At the most immediate level, the advertising prohibited by these statutes conveys useful commercial information. It tells the public what kind of legal games are available and where, the stakes involved, and the sponsoring organiza-

tions. On a more general level, the audience for such advertising is not confined to people who want to gamble; it also includes people who are interested in inexpensive social entertainment, people who are concerned about support for charitable causes,[1] and even people who are adamantly opposed to gambling. Here, the advertising provides the most direct information about the nature, scope, and sponsorship of gaming activities to the voters whose individual decisions will determine whether and to what extent a state permits gambling in the first place.

This critical point was overlooked by the District Court in holding that the federal government has an interest in "protecting the policy choices of the individual states" by keeping gambling information out of those states. App. at 12a. Such policy choices are not made by the "states" in the abstract; they are made by the citizens of those states, a fact which, ironically, the court acknowledged by expressing concern that removal of mailing restrictions "may lead some states to liberalize their lottery regulations in order to encourage commerce." App. at 11a. But this is not an evil to be avoided by federal regulation—it is the essence of democratic self-government. If voters are called upon to either approve or prohibit forms of gambling within their states, they cannot do so intelligently without adequate information about the nature of the activities themselves. The public cannot rely on an occasional news story or editorial for

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[1] With the dramatic decline in government funding, this concern takes on particular importance. *See, e.g.*, S. Rep. No. 537, 98th Cong., 2d Sess. 3 (1984) [hereinafter S. Rep. No. 537]:

> It is incongruous that the Congress, at a time when churches and charities in the private sector are increasingly assuming the burden of many social programs, should stand in the way of those States which have made a policy determination that churches and charities can use lotteries and raffles as a means of raising desperately needed revenues.

The Judiciary Committee concurred in this observation by one witness during hearings on the same statutes under review in the present case. *Id.*

this information. The true extent and character of gaming activities in a community are best conveyed by the sponsors' own announcements—*i.e.*, advertising. If these are barred from the mails and local newspapers, only participants and members of sponsoring organizations are likely to have this information, and even then, it will be limited. The broad overview necessary for informed decision-making depends on wider dissemination through mail and newspaper advertising.

The District Court understood the function of news about lottery prizes in this process, striking down the prohibition against their publication on pure First Amendment grounds, and this Court should uphold that finding against the government's present appeal. However, this Court should also reaffirm the valuable function of advertising in the democratic process and strike down the remaining restrictions as inconsistent with the First Amendment.

In simple terms, the fact that the advertising in this case involves gambling should increase, rather than diminish, First Amendment concerns. The use of gambling to fund charitable and social programs of states, Indian tribes, and other organizations is more than commercial activity—it is also an emotional political issue [2] and an activity that traditionally has been subject to extensive state regulation. The subject is therefore one about which the public has a particular need to know the facts, as they are the ultimate authors of those "policy choices of the individual states" that the District Court seeks to protect. Commercial speech in this context is truly "indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Virginia State Board*, 425 U.S. at 765.

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[2] *See, e.g.*, S. Rep. No. 537, *supra* note 1 at 11-13 (additional views of Senators Hatch and East).

II. THE FEDERAL GOVERNMENT HAS NO SUBSTANTIAL INTEREST IN PREVENTING DISSEMINATION OF INFORMATION ABOUT GAMBLING

The Court in *Posadas* reaffirmed application of the four-part test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980),[3] in analyzing restrictions on gambling advertising. Although, as discussed above, gambling information should be accorded even broader First Amendment protection, the statutes here in question fail even the lenient standard of *Central Hudson*. The federal government's interest simply is not substantial enough to justify what is, in effect, a total ban on mail and newspaper advertising of these state-sanctioned gaming activities.

A. The Federal Government Has No Substantial Interest in Preventing Mere Information From Crossing State Lines

The district court articulated two federal interests served by the prohibition against mailing lottery information: (1) a general interest in protecting the individual states' interest in the "health, safety, and welfare" of their citizens; and (2) a conveniently revived interest in preventing the rise of national private lotteries. The court noted that the first of these—the general interest in "health, safety, and welfare"—was held by this Court in *Posadas* to be a substantial interest served by Puerto Rico's regulation of advertising within its borders. But as previously noted, both the purpose and effect of that regulatory scheme was to strike an unusual balance between the commonwealth's sharply conflicting interests in encouraging gambling by out-of-state tourists, while at

[3] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), sets forth a four part analysis for restrictions on commercial speech. First, the commercial speech must concern lawful activity and not be misleading. Second, the asserted governmental interest in regulating the speech must be substantial. Third, the regulation must directly advance the asserted governmental interest. Fourth, the regulation must not be more extensive than is necessary to serve that interest.

the same time discouraging local participation. On closer examination, it is clear that the general police power of the states is not a logical basis for finding that the federal government has a substantial interest in preventing information, commercial or otherwise, from reaching citizens of those states.

First, the argument *assumes* that the individual states have a substantial interest in discouraging lotteries and games of chance—an assumption that is not borne out by the facts.[4] But more importantly, the district court's conclusion is based on a misunderstanding of this Court's reasoning in *Bigelow v. Virginia*, 421 U.S. 809 (1975). In *Bigelow*, the Court struck down the state of Virginia's attempt to prevent advertising of abortion services available in New York, where such services were legal. The Court recognized:

> [Virginia] is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances.

Id. at 828-29.[5] The Court concluded that the state could not bar such advertising of lawful out-of-state activities "without unconstitutionally infringing upon . . . First Amendment rights." *Id.* at 829. The District Court in this appeal, however, cited this same reasoning for the proposition that because the state "cannot prohibit local advertising of out-of-state services which are legal in the advertiser's state," it logically follows that the federal government must step in to protect this unconstitutional *state* interest. *See* App. at 8a-9a. The argument is circular and misunderstands the constitutional dimension of the prohibition in *Bigelow*.

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[4] *See* discussion *infra* at 11.

[5] The Court went on to note that where, as in the present case, sanctions against advertising are imposed on the newspaper that carries the advertisements, "the prosecution . . . incur[s] more serious First Amendment overtones." 421 U.S. at 828.

The District Court's reasoning is also flawed in its assumption that the states would choose to prevent out-of-state gambling information from reaching their citizens as a means of regulating gambling activities within their own borders. Disregarding for the moment whether such an interest could ever be constitutional under *Bigelow* and *Central Hudson*, there is no evidence that any appreciable number of states would espouse such an interest. Only a few states currently prohibit all forms of gambling; in fact, most states permit recreational and fund-raising games of chance, horse racing, and other traditional forms of wagering.[6]

On these facts, the federal interest in prohibiting the dissemination of gambling information can hardly be seen as substantial. Stated simply, the government has no substantial and constitutionally legitimate interest in reducing discourse, even on this subject, to the level permitted by the most restrictive state, particularly where the practical effect is to deny information to citizens within the vast majority of states where the activities are legal.[7]

Finally, the exceptions in 18 U.S.C. § 1307, which permit advertising of state-conducted lotteries, demonstrate that the interest in restricting gambling information is not substantial. The district court, however, summarily rejected this argument, reasoning that Section 1307 permits only advertisements in newspapers published within states conducting such a lottery and therefore "does not affect newspapers in nonlottery states." App. at 10a. What the court overlooked, however, is the fact that once the state of origin qualification is met, state lottery advertising can be mailed anywhere in the United States. The federal scheme thus permits lottery information and advertising concerning the largest lottery activities in the country to be mailed into any state, while restricting

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[6] S. Rep. No. 537, *supra* note 1 at 1-2; Exhibit B to Affidavit of Mark R. Anfinson at 2.

[7] *See Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73-74 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

information about small local charity-sponsored activities from reaching members of their own communities through the mail. The inconsistency of such an approach itself refutes the claimed substantiality of the government's interest.[8]

B. The Federal Government Has No Substantial Interest in Discouraging Gambling Within the Individual States

The second "substantial" interest articulated by the district court is the government's claimed interest in restricting the interstate growth of private lotteries and its attendant concerns about possible criminal involvement. In this, both the government and the District Court seek to prove too much. The legitimate federal interest in preventing interstate crime is a separate concern that has only the most tenuous relation to a prohibition against mailing information. It is the states, not the federal government, that have a substantial interest in determining whether and to what extent they will permit, prohibit, and/or regulate gambling within their borders. The government has made no showing whatsoever that *information* about a strictly local and legal game of chance advertised in a local newspaper that happens to be mailed, poses any threat of becoming or encouraging an interstate private lottery.

Amici respectfully submit that the government's argument is nothing more than a post facto rationalization

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[8] *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984):

> The modest nature of Oklahoma's interest may be further illustrated by noting that Oklahoma has chosen not to press its campaign against alcoholic beverage advertising on all fronts. . . . The ban at issue in this case is directed only at wine commercials that occasionally appear on out-of-state signals carried by cable operators. By their own terms, therefore, the State's regulatory aims in this area are narrow. . . . [T]he selective approach Oklahoma has taken toward liquor advertising suggests limits on the substantiality of the interests it asserts here.

See also Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975).

based on the century-old legislative purpose of the original Lottery Act, Act of June 8, 1872, ch. 335, § 149, 17 Stat. 283, 302, which is no longer valid. Of the forty-two states in existence in 1890, all but three prohibited lotteries altogether, responding to the widespread evil of "completely unregulated and generally fraudulent wagering schemes."[9] Congress, which shared the states' desire to abolish these lotteries, enacted the Lottery Act to prevent use of the mails as a means to evade this almost universal prohibition.[10]

Today the situation has completely reversed. Forty-five states now *permit* wagering on bingo and other amusements, thirty-six permit betting on horse races, and at least eighteen states conduct and advertise their own lotteries.[11] Virtually all are closely regulated and provide much-needed funding for charities and social programs. The widespread anti-lottery sentiment reflected in the 1890 Lottery Act no longer exists. Yet the District Court declared that the concern expressed in legislative history "remains relevant and substantial" because of the possibility of criminal involvement. App. at 11a. As previously noted, these are two separate concerns, and whatever substantiality the latter may have in the abstract is addressed through increased regulatory supervision, not through suppression of information.[12]

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[9] S. Rep. No. 537, *supra* note 1 at 1; S. Rep. No. 1579, 51st Cong., 1st Sess. 1 (1890). (Counsel is indebted to Margaret L. Gready and Gannett Co. for research on the legislative history of the Lottery Act.)

[10] H.R. Rep. No. 2678, 49th Cong., 1st Sess. (1886).

[11] S. Rep. No. 537, *supra* note 1, at 1-2. These figures are as of 1984; ten additional states now conduct or have authorized lotteries.

[12] This court's decision in *Smith v. United States*, 431 U.S. 291 (1977), relied upon by the District Court, does not aid the government's position. In that case, the material being mailed was obscene and thus not entitled to constitutional protection. Legal gambling advertising, on the other hand, is entitled to at least the First Amendment protection accorded commercial speech. *See* discussion *supra* at 7-11.

III. THE MAILING PROHIBITIONS ARE NOT NARROWLY TAILORED TO ADDRESS THE ASSERTED GOVERNMENT INTERESTS

Even if substantiality of the government interest is assumed for the sake of argument, the means chosen to advance that interest are not confined to the narrow limits required by the First Amendment and this Court's decision in *Central Hudson*.

A. The Mailing Prohibitions Effectively Prevent Even Nonmailed Advertising Within Its State of Origin

A newspaper faced with the prospect of criminal prosecution and loss of its mailing privileges by publishing advertising for strictly local and legal games of chance will make the obvious choice to forego the advertising. Thus, a mailing restriction designed to prevent interstate dissemination of advertising effectively prevents mailing within the state and ultimately forecloses the local newspaper as a medium for such advertising. The organizations that depend on local participation in their games are barred from reaching their audience not only through the mail, but also through direct delivery of the newspaper.

To say that the regulation goes too far is an understatement. It not only encroaches upon activities that are completely legal within the state and advertising that is protected by the First Amendment; it does so for the declared purpose of preventing such advertising from crossing state lines. The end result is a regulation whose purpose is directed only at the smallest percentage of newspaper circulation, yet whose effect prohibits publication of completely lawful gambling advertising altogether and forbids even local direct mail advertising.[13]

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[13] This restriction on the use of the mails is far from insignificant. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 69 n.18

B. Less Intrusive Alternatives Already Exist in the Statute

If the government's declared purposes—*i.e.*, to restrain the growth of interstate lotteries and to protect the autonomy of individual state gambling policies—are taken at face value, those purposes can be served much more directly. Interstate mailing or transportation of lottery paraphernalia and use of the mails to actually conduct or participate in a lottery are already prohibited. 18 U.S.C. §§ 1301, 1302.[14] By choosing in addition to prevent the mailing of information, the government has stepped far beyond even its stated goals and encroached upon commercial speech clearly protected by the First Amendment. It has effectively denied those charitable organizations who rely upon lawful games of chance for fundraising the two most effective means to promote these worthy activities—the mail and the newspaper.

CONCLUSION

Information about lawful gaming activities, even in the form of advertising, is more than pure commercial speech. It is the factual base upon which the public forms its decisions about whether and to what extent such activities should be permitted and regulated. No legitimate purpose is served by prohibiting the dissemination of this information, even to citizens of those states who have not yet decided these questions.

(1983) (quoting *Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting):

> The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. . . .

[14] The portions of the statutes prohibiting interstate mailing or transportation of lottery paraphernalia and use of the mails to conduct or participate in the lottery do not raise First Amendment concerns as they regulate conduct, not speech.

The present law, by discouraging even local newspaper advertising, prevents lawful gaming information from reaching its intended audience—citizens of communities where the games are authorized. This result goes beyond even the stated purposes of the law and infringes First Amendment rights of both the advertisers and the public.

For all of the above reasons, the statutes challenged by the Minnesota Newspaper Association should be overturned.

Respectfully submitted,

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Nos. 87-1943 and 87-1956

In the Supreme Court of the United States

OCTOBER TERM, 1988

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JOINT APPENDIX

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PROBABLE JURISDICTION NOTED OCTOBER 3, 1988

28 pp

In the Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1943 and 87-1956

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

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ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

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JOINT APPENDIX

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* The opinion and judgment of the district court are printed in the appendix to the jurisdictional statement in No. 87-1956 and have not been reproduced herein.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
9-15-86	1	COMPLAINT – summons issued/by Mpls.,
12-15-86	6	ANSWER OF DEFTS.
6-23-87	7	DEFTS. NO/MO FOR SUMMARY JUDGMENT, Ret. before __ on 8-28-87 at 9:00 a.m.
	9	AFFIDAVIT OF LINDA I. FALKMAN
	10	AFFIDAVIT OF MARK R. ANFINSON wi/att exhibits
1-6-88	13	MEMORANDUM AND ORDER (PAM/ 12-31-87) that the motion of Deft. Postmaster General for summary judgment is PARTIALLY GRANTED and the motion of pltf. MNA is PARTIALLY DENIED; the mo[ti]on of pltf. MNA for summary judgment is PARTIALLY GRANTED and the motion of Postmaster General is PARTIALLY DENIED; the deft is permanently enjoined from further enforcement of the restrictions on prize lists; the motion of deft. Postmaster General to strike affs. is denied. cc:attys (pk)
	14	JUDGMENT (entered)
1-28-88	15	DEFENDANTS' NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM JUDGE MAGNUSON'S MEMORANDUM AND ORDER OF 12-31-87.
1-29-88	16	PLAINTIFF'S NOTICE OF CROSS-APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM JUDGE MAGNUSON'S MEMORANDUM AND ORDER OF 12-31-87.
2-01-88		Mailed a copy of the Notice of Appeal, Notice of Cross-Appeal and District Court Clerk's Docket Entries to Counsel.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC., PLAINTIFF,

v.

POSTMASTER GENERAL OF THE
UNITED STATES, UNITED STATES POSTAL SERVICE, AND
UNITED STATES OF AMERICA, DEFENDANTS.

COMPLAINT

For its Complaint, plaintiff Minnesota Newspaper Association, Inc. alleges as follows:

SUMMARY OF COMPLAINT

1. In this action plaintiff Minnesota Newspaper Association, Inc. is asking the Court for declaratory and injunctive relief against defendants. Plaintiff believes that 18 U.S.C., Section 1302, 39 U.S.C., Section 3001, and 39 U.S.C., Section 3005 are unconstitutional as applied by the United States Postal Service to plaintiff and plaintiff's members. They should therefore be declared void. Plaintiff further is seeking an injunction against agents and employees of the United States Postal Service prohibiting them from threatening to enforce or enforcing these statutes with respect to plaintiff and its members.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1339, since the action arises under an Act of Congress relating to the postal service. Jurisdiction is further based on 28 U.S.C., Section 1331(a) because this action arises under a provision of an Act of Congress and the matter in controversy involves a sum of more than $10,000, exclusive of interests and costs. Since plaintiff is asking for declaratory and injunctive relief, jurisdiction is also invoked under 28 U.S.C., Sections 2201 and 2202.

VENUE

3. Venue is proper in this district under 18 U.S.C., Section 1391(e).

PARTIES

4. Plaintiff Minnesota Newspaper Association, Inc. (MNA) is a corporation organized under the laws of the State of Minnesota, with its principal offices in Minneapolis. It is an association of all of the general interest newspapers and many of the special interest newspapers in Minnesota, and is the primary advocate and representative of the organized newspaper press in the state.

5. Defendant Postmaster General heads defendant United States Postal Service, and as such is responsible for enforcement of the statutes and regulations described in this Complaint. At the time of the filing of this Complaint, the office of Postmaster General is vacant. Plaintiff intends to name the Postmaster General individually once he or she is designated. The United States Postal Service (USPS) is an agency of the United States government, organized as a public corporation under the authority of Congress. The United States is also named as a

defendant because through its various branches and agencies it is ultimately responsible for the organization and administration of the USPS.

FACTS

6. The member newspapers of MNA as well as MNA itself are engaged in the sale and distribution of newspapers and newspaper advertising, among their other activities. In connection with this sale and distribution, they frequently use the United States mail.

7. Many entities and organizations in the State of Minnesota conduct various types of legal gaming activities. Said entities and organizations primarily consist of churches, veterans' groups, civic organizations, nonprofit entities, as well as bingo operations conducted on reservations by American Indian tribes. The primary gaming activities consist of bingo games and similar lottery operations in which winners are generally determined by chance.

8. The gaming activities just described are all lawfully and properly conducted in Minnesota, being licensed and regulated by the Minnesota Charitable Gambling Board, with one exception. This exception involves gaming operations of the American Indian tribes, which are not regulated by the state but are subject to federal law.

9. MNA and its member newspapers frequently desire to provide news coverage of or promote said gaming activities, since there is widespread public interest and participation in them, and because they often are conducted for civic purposes and community benefit.

10. MNA and its member newspapers have also repeatedly been approached by representatives of the gaming organizations described above, who have requested the placement of newspaper advertising promoting and describing their gaming activities.

11. 18 U.S.C., Section 1302 provides in pertinent part as follows:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing a list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;
>
> Shall be fined not more than $1,000 or imprisoned not more than two years or both; and for any subsequent offense shall be imprisoned not more than five years.

12. 39 U.S.C., Section 3001(a) provides in pertinent part that matter deposited in the mails which is punishable under 18 U.S.C., Section 1302 is nonmailable.

13. 39 U.S.C, Section 3005 provides in pertinent part that the United States Postal Service may take certain actions to prevent use of the mail in connection with activities distributing money or property by "lottery, chance, or drawing of any kind."

14. The substance of the statutes described above are reflected in Section 123.42 and other sections of the Domestic Mail Manual, which contains the duly adopted regulations of the USPS.

15. MNA and its members have sought to comply with the statutes described above. As a result of these statutes and due to the interpretation and application of these statutes adopted by the USPS by formal regulation and otherwise, MNA and its members have been required to

refuse advertising involving the legal gaming activities described above.

16. Because the language of the statutes is vague and unclear, and because their interpretation and application by the USPS have been inconsistent, arbitrary, and confusing, MNA and its members have no clear idea as to what may be lawfully published and have found it necessary to avoid publishing not just advertising but nearly all copy involving gaming activities dependent on chance for fear of being subjected to the sanctions and penalties described above.

17. In many cases where a newspaper has proposed to publish or has inadvertently published such advertising or other copy, the newspaper has been threatened with sanctions and penalties by representatives of the USPS. Further, the USPS has directly told MNA to notify its members that further publication would cause the USPS to seek penalties under the statutes against offending newspapers.

18. All of the copy referred to in this Complaint involves gaming activities that are entirely lawful under both state and federal law, and which are permitted and regulated by the state or federal governments.

COUNT ONE

19. The statutes described above violate the free speech and free press guarantees of the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, because they prohibit and chill the dissemination by plaintiff and its member newspapers of truthful information about lawful activities. The receipt of such information would be of great benefit to the public.

20. The actions of agents and employees of the USPS, as well as the Postal Service's duly adopted regulations under the above-described statutes violate the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, because they prohibit and chill the dissemination by plaintiff and its member newspapers of truthful information about lawful activities.

COUNT TWO

22. Because the prohibitions of the statutes described above apply only to mailed matter, and not to most other methods of disseminating information about lawful gaming activities, the statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by discriminating in favor of certain media of dissemination that are not required to use the mails. This classification cannot be supported by any identifiable state interest.

COUNT THREE

22. The statutes described above are overbroad in that they do not distinguish between the dissemination of information about lawful and unlawful activity. By failing to make this distinction, the statutes are over-inclusive and therefore unconstitutional as applied to plaintiff and its members.

COUNT FOUR

23. The statutes described above violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution because the government's interference with the constitutional guarantees of plaintiff and plain-

tiff's members is not supported by any significant state interest, it is not closely tailored to effectuate any state interest that may exist, and there is no rational relationship between any legitimate state purpose and the means employed to achieve this purpose.

24. There exists an actual controversy among the parties to this Complaint. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff Minnesota Newspaper Association, Inc. asks the judgment of this Court as follows:

A. For a declaration that 18 U.S.C., Section 1302, 39 U.S.C., Section 3001, and 39 U.S.C., Section 3005, as applied to plaintiff and its member newspapers are unconstitutional and therefore void to the extent they prohibit or interfere with the publication of information about lawful gaming activities, regardless of the form.

B. For a declaration that rules and regulations promulgated by the USPS under said statutes are similarly unconstitutional and therefore void.

C. For a permanent injunction enjoining defendants and their agents and employees from threatening to enforce or enforcing said statutes or rules and regulations adopted pursuant to these statutes against plaintiff or plaintiff's newspaper members in the cases described in paragraph A above.

D. For costs, disbursements, and attorney's fees incurred by plaintiff in connection with this action.

E. For such other relief as the Court believes to be just and proper.

DATED: September 15, 1986.

/s/ MARK R. ANFINSON

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UNITED STATES DISTRICT COURT
THIRD DIVISION
DISTRICT OF MINNESOTA

Civil Action No. 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC., PLAINTIFF,

v.

POSTMASTER GENERAL OF THE UNITED STATES,
UNITED STATES POSTAL SERVICE, AND
UNITED STATES OF AMERICA, DEFENDANTS.

[Filed Dec. 15, 1986]

ANSWER

Defendants, by their undersigned attorneys, answer the complaint as follows:

First Defense

The complaint fails to stated a claim upon which relief can be granted.

Second Defense

Plaintiff lacks standing to maintain this action.

Third Defense

The complaint does not present a justiciable case or controversy.

Fourth Defense

Defendants answer the numbered paragraphs of the complaint as follows:

1. Paragraph 1 contains plaintiff's characterization of its action and conclusions of law, not averments of fact to which an answer is required, but insofar as an answer may be deemed required, defendants deny paragraph 1.

2. As to paragraph 2, defendants admit that the Court has jurisdiction by virtue of 28 U.S.C. §§ 1331 and 1339, and deny the remainder of the paragraph.

3. As to paragraph 3, defendants admit that the venue is proper, pursuant to 28 U.S.C. § 1391(e).

4. Defendants are without knowledge or information sufficient to form a belief as the truth of the allegations in paragraphs 4, 6, 7, 8, 9, 10, 15, and 18.

5. Defendants deny paragraph 5, except to admit that the U.S. Postal Service is an independent establishment of the executive branch of the Government of the United States, under the direction of a Board of Governors; that the Postmaster General is its chief executive officer, responsible for its overall operation; and that the U.S. Postal Service is responsible for the enforcement of 39 U.S.C. §§ 3001 and 3005. Defendants also deny that the United States is a proper defendant to this action.

6. As to paragraphs 11 and 13, defendants admit that the paragraphs describe in part certain portions of 18 U.S.C. § 1302 and 39 U.S.C. § 3005, but the Court is referred to those sections for their contents.

7. Defendants deny paragraph 12, and the Court is referred to the cited statute for a correct statement of its provisions.

8. As to paragraph 14, Defendants deny that the substance of 39 U.S.C. § 3005 is reflected in Section

123.42 and other sections of the Postal Service's Domestic Mail Manual, and admit the remainder of the paragraph.

9. Defendants deny the allegations in paragraph 16, that "the language of the statutes is vague and unclear" and "their interpretation and application by the USPS have been inconsistent, arbitrary, and confusing." Defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 16.

10. Defendants are without knowledge or information sufficient to form a belief as to the allegations in paragraph 17, but are not aware of any such threats or notifications to plaintiff.

11. Paragraphs 19 through 23 (Counts One through Four) contain averments of fact, as well as conclusions of law, and, insofar as an answer may be required, defendants deny all of them.

12. As to paragraph 24, Defendants deny the existence of a case or controversy for lack of specific evidence of any "threats" made to plaintiff.

13. Defendants hereby specifically deny any allegations of the complaint not hereinbefore otherwise answered.

Respectfully submitted,

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JEROME G. ARNOLD
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC., PLAINTIFF,

v.

POSTMASTER GENERAL; UNITED STATES POSTAL SERVICE; AND UNITED STATES OF AMERICA, DEFENDANTS.

AFFIDAVIT OF LINDA I. FALKMAN

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Linda I. Falkman, being first duly sworn, on oath states as follows:

1. I am Executive Director of the Minnesota Newspaper Association (MNA), and I have served in this capacity since February, 1984. Prior to being appointed Executive Director, I served as Assistant Executive Director of MNA for nine years.

2. The Minnesota Newspaper Association is a trade association representing virtually all of the newspapers in the state of Minnesota.

3. In my role as Executive Director, I have developed an extensive personal familiarity with the problems caused for Minnesota newspapers by the postal lottery statutes.

4. Nearly all of the newspapers in Minnesota rely heavily on the United States mail to distribute their pub-

lications. Particularly in the case of the smaller, non-metro newspapers, a substantial percentage of the circulation of the newspaper is distributed through the mail. If the mail was not available, most of these newspapers would be unable to distribute their issues, since only rarely are there financially feasible alternatives available to them.

5. Each year the postal lottery statutes force Minnesota newspapers to reject not only a great deal of advertising, but also much news copy, all of which I believe would be of considerable benefit to the reader of the newspapers.

6. MNA itself also is significantly inhibited by the postal lottery statutes because it acts on behalf of individual newspapers in selling advertising throughout the country. MNA also distributes advertising, editorials, and promotional copy to newspapers by means of the mail.

7. In June, 1985 I was personally contacted by a United States Postal Inspector from the St. Paul office of the USPS. He explained that he wanted to meet with me because there appeared to be an increasing number of controversies involving the postal lottery statutes occuring throughout the state. During our meeting he requested that I warn newspapers that it is a criminal act to carry lottery advertising and similar matter. I communicated this warning to the membership, and I believe it has further chilled the publication of information about gaming.

8. I believe there is a serious problem with defining exactly what types of lotteries and other games of chance are prohibited by the statutes. I get many questions about this every year from newspapers in Minnesota. There is much doubt among Minnesota newspapers concerning what can be published and what cannot be. As a result of this uncertainty, there is a considerable amount of advertising and

other matter about gaming and gambling that is simply not published.

9. I have reviewed the attached Affidavit of Mark R. Anfinson, and I can confirm from my own experience that the statements in his Affidavit are accurate.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ LINDA I. FALKMAN
Linda I. Falkman

Subscribed and sworn to before me
this 28th day of August, 1987.

/s/ MARK R. ANFINSON
Notary Public—Minnesota

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC., PLAINTIFF,

v.

POSTMASTER GENERAL; UNITED STATES POSTAL SERVICE; AND UNITED STATES OF AMERICA, DEFENDANTS.

AFFIDAVIT OF MARK R. ANFINSON

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Mark R. Anfinson, being first duly sworn, on oath states as follows:

1. I presently serve as attorney for the Minnesota Newspaper Association (MNA), and I have held this position for approximately the past five years.

2. A substantial portion of my professional work for MNA involves counselling newspapers about the meaning and application of various state and federal statutes. In the course of such counselling, I engage in much conversation and correspondence with publishers, editors, and other newspaper staff members. Because of my position, I believe there are few people in the state who have a more comprehensive view of the legal problems of Minnesota newspapers than I do.

3. Over the past few years, I have received a steadily increasing number of questions from newspapers about

the meaning and application of the postal lottery statutes. It is clear that this increase is due to the expansion of lawful gaming in Minnesota. The questions have related not only to advertising, but also to news stories, lists of prizes, public announcements, pictures of winners, community billboard items, editorials, and virtually all other types of copy that might appear in a newspaper.

4. The great majority of questions I receive concerning the statutes involves advertising and other newspaper copy that is neither false nor misleading. In fact, nearly all newspapers have a policy against publishing untruthful or misleading advertising.

5. From my experience, I can testify with certainty that there is an enormous amount of confusion in the newspaper industry and among advertisers as to what sorts of activity the postal lottery statutes apply to. Because of the way the statutes are drafted, I am often unable despite considerable work with this subject to provide newspapers with specific guidelines about what the law prohibits.

6. Because mailing privileges are essential to most newspaper operations, newspapers have had to deal with the statutory prohibitions very conservatively. As a result, the prohibitions have caused a near total ban on any gambling or gaming advertising in Minnesota newspapers.

7. I have personally been involved in or am otherwise familiar with many instances over the past few years where local, regional, and national postal officials have threatened individual newspapers with sanctions for violating the postal lottery statutes. In issuing these threats, the various postal officials have often been inconsistent in their interpretations of the law.

8. The prohibitions have also caused a severe chill on the publication of items of any kind about legal gaming and gambling, including news stories, promotional items,

feature stories, editorials, community calendar items, pictures, and the like.

9. Over the years I have had numerous conversations with various postal officials charged with enforcement of the statutes. They have frankly acknowledged to me in many of those conversations that they are not certain about what the statutes mean, and that they regard the statutes as largely outmoded, and that the enforcement responsibilities are mainly an annoyance that distracts them from more important duties.

10. These statutes also cause many practical difficulties for local newspapers. They are put in a position of having to refuse all promotional or advertising material for worthy local fund raising and charitable events if those events might involve any game of chance. Rarely do local civic leaders understand the reasons for the refusal, and they often blame the newspaper for being unreasonable.

11. A recent example among many that might be cited to illustrate the arbitrariness and confusion that surrounds application of the postal lottery statutes is as follows. In October, 1986 an attorney in Crosby, Minnesota, wrote the local postmaster on behalf of several charitable groups of which the attorney was a member.

The attorney submitted to the postmaster two proposed advertisements promoting the annual fund raising bingo benefit for the Crosby Volunteer Fire Department. The advertisements had been refused by the newspaper based on my advice that the copy appeared to constitute the type of matter that postal authorities had previously held to be a violation of the statutes.

In response to the attorney's request, the postmaster apparently contacted the Chicago Regional Office of the USPS, and in November replied to the attorney that the advertisements in question "are acceptable so long as they neither solicit money nor property."

When I learned of this interpretation, I personally contacted the Chicago Regional Office of the USPS since it appeared to be inconsistent with other determinations. I spoke in some detail and corresponded with officials in Chicago. They decided to refer the matter to the Washington Headquarters of the USPS, but their conclusion was that the advice rendered to the Crosby postmaster seemed incorrect, and that the material was probably not mailable.

I still have not received a response from the USPS in Washington despite the passage of several months. This example illustrates how inconsistent and confusing the application of the laws can be, and how difficult it is for newspapers and members of the community to know when they may publish particular matter.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ MARK R. ANFINSON
Mark R. Anfinson

Subscribed and sworn to before me
this 28th day of August, 1987.

/s/ ALICE J. ENGSTROM
Notary Public

Exhibit B to Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment

Overview of Gaming Activities in Minnesota and the United States[1]

Gambling and games of chance have a long history. In America, they appeared at least as early as the original English settlement at Jamestown, Virginia.

Lotteries in particular became popular in the mid-1800's. But the regulations and prohibitions that were triggered as the result of widespread corruption, combined with a new social and moral hostility to gambling, significantly reduced legal gambling. Until after World War II gambling activities enjoyed only modest participation among the general public.

In the last 15 or 20 years however there has been a marked increase in gambling participation throughout the country. As the figures below demonstrate, in most regions gambling (or gaming as it is known in the industry) is now a popular and accepted form of entertainment in its many varieties.

Currently the major forms of gambling in the United States are bingo, card rooms, casinos, greyhounds, harness racing, quarter horses, thoroughbred racing, jai-alai, lotteries, numbers games, lotto, and video lotteries. Nearly all states permit at least some types of gambling. At present only four states—Hawaii, Indiana, Mississippi, and Utah—do not permit any form of gambling.

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[1] Sources: *S. Rep. 98-537, 98th Cong. 2d Sess. 1* (6/28/84); various recent issues of *Gaming and Wagering Business* (a leading trade publication); personal interviews and correspondence with Minnesota Charitable Gambling Control Board; miscellaneous other sources.

At least 22 states sponsor lotteries, bingo is legal in 45 states, greyhound racing in 15 states, horse racing in 36 states, and casinos in Nevada and New Jersey.

In 1984 an estimated 177 billion dollars were handled in both legal and illegal United States commercial gambling. Gross gambling revenues for 1984 were about 18.8 billion dollars, an increase of nearly 12% over 1983.

Gambling has in fact become one of the most popular forms of recreation in the country. Revenues in 1984 were more than four times as large as the total receipts generated by United States movie houses. It is estimated that about 12% of all recreational spending by Americans went to gambling in 1984.

Contrary to some perceptions, illegal gambling revenues comprise a relatively small portion of the total market share. Estimates are that in 1984 illegal gambling constituted approximately 28% of the total revenues.

The 72% of total gaming revenues from legal gambling was distributed a: follows in 1984: Casinos—26.9%; lotteries—22.1%; parimutuel betting—15.7%; bingo and other charitable gaming—7.1%; and legal bookmaking—.3%.

The state sponsored lotteries are the fastest growing form of gaming. They increased nearly 40% between 1983 and 1984. Also growing rapidly are legal bookmaking and charitable gaming.

State lottery growth has been particularly dramatic at least in part because many lawmakers believe that it is a less painful method of increasing state revenues. Minnesota does not yet have a state lottery, although the current governor and many state legislators have been aggressively promoting the idea.

The figures described above do not include gambling on American Indian reservations. Such figures are difficult to

verify, but fragmentary statistics show that the volume of gaming activity on the reservations has been increasing significantly in recent years.

In short, over the past 20 years or so there has been a major change in public attitudes towards gaming in America.

Charitable gaming is highly regulated in Minnesota, as in most other states. In Minnesota, several forms of gambling are permitted by state law. This of course includes the recently authorized horse racing conducted at Canterbury Downs. However, the great majority of legal gambling activity in Minnesota falls into the category of charitable gaming.

The Board has jurisdiction over all charitable gambling. Any fraternal, religious, veterans, or other nonprofit organization with essentially charitable purposes may apply for a license to engage in certain gaming activities. Charitable gaming in Minnesota consists primarily of bingo, raffles, paddlewheels, tipboards, and pull tabs.

The state licensing scheme has become quite rigorous, and the Charitable Gambling Control Board requires a significant amount of information about a licensee both in initial license applications and in mandatory annual reports.

Precise statistics for legal gambling activity in Minnesota (other than horse racing) are unavailable, since until very recently charitable gambling regulation was a hodgepodge of state and local control. However, in 1984 the Legislature established the Charitable Gambling Control Board, and as of July 1, 1985, all charitable gambling activities were required to come under state licensing and regulation.

In the first six months subject to full state regulation (approximately July-December 1985), the gross revenues

of charitable gambling organizations in Minnesota appears to total about 120 million dollars. The basis of this calculation is that 10% of all net profits on charitable gaming must be paid to the state. These figures project yearly gross receipts for charitable gambling in Minnesota of about 250 million dollars. The state also collects license fees from charitable gaming operations in addition to its share of the receipts.

During this initial period of state regulation, the most reliable figures indicate that bingo accounted for about 25-30% of all receipts.

As of approximately January 1, 1986 there were 1821 charitable organizations licensed to conduct gaming activities at 2400 separate sites throughout the state. There are no good figures on the number of Minnesotans who participate in charitable gaming since licensees are not required to report this information. However, based on revenues it is reasonable to assume that participation is widespread.

More exact figures are available for gambling on horse racing in Minnesota, which was just legalized in 1985. It is estimated that 90% of the 1.1 million people who attended Canterbury Downs' first season were Minnesota residents. The total amount of money wagered at Canterbury Downs in 1985 totaled just slightly over 84 million dollars. From the various taxes and other fees collected at the track, the state earned approximately five million dollars.

Supreme Court of the United States

No. 87-1943

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

October 3, 1988

APPEAL from the United States District Court for the District of Minnesota. The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with 87-1956, *Anthony M. Frank, Postmaster General of the United States, et al.* v. *Minnesota Newspaper Association, Inc.*, and a total of 1 hour is allotted for oral argument.

Supreme Court of the United States

No. 87-1956

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

October 3, 1988

APPEAL from the United States District Court for the District of Minnesota. The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted. This case is consolidated with 87-1943, *Minnesota Newspaper Association, Inc.* v. *Postmaster General of the United States, et al.*, and a total of 1 hour is allotted for oral argument.

U.S. GOVERNMENT PRINTING OFFICE 1988—241 [illegible]

Nos. 87-1943 and 87-1956

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In the Supreme Court of the United States

OCTOBER TERM, 1988

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE FEDERAL PARTIES

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QUESTION PRESENTED

Section 1302 para. 5 of Title 18 makes it a crime knowingly to mail "any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance," or "any list of the prizes drawn or awarded" by means of any such lottery or similar enterprise. The question is whether the advertisement and prize list clauses in Section 1302 are invalid under the First Amendment.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the United States Postal Service and the United States of America were named as defendants in the district court. They are appellants in this Court in No. 87-1956 and appellees in No. 87-1943.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1943

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

No. 87-1956

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE FEDERAL PARTIES

OPINION BELOW

The opinion of the district court (J.S. App. 1a-20a)[1] is reported at 677 F. Supp. 1400.

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[1] Unless otherwise noted, J.S. App. refers to the jurisdictional statement appendix in No. 87-1956.

JURISDICTION

The judgment of the district court (J.S. App. 21a-22a) was entered on January 6, 1988. A notice of appeal (J.S. App. 23a-24a) was filed on January 28, 1988. On March 17, 1988, Justice Blackmun extended the time within which to docket the appeal to and including May 27, 1988, and the appeal was docketed on that date. A notice of appeal was filed in No. 87-1943 on January 29, 1988 (87-1943 J.S. App. 21a). On March 21 and April 6, 1988, Justice Blackmun entered orders extending the time within which to docket the appeal in No. 87-1943 to and including May 28, 1988, and the appeal was docketed on May 27, 1988. This Court noted probable jurisdiction in both cases on October 3, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1252.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

A. Historical And Statutory Background

1. Lotteries have an ancient pedigree.[2] In England and during the early history of this nation, lotteries were a popular and respectable activity.[3] Beginning in the Jacksonian period, however, lotteries fell into disfavor

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[2] The first king of Israel was chosen by lot. 1 *Samuel* 10:20-21.

[3] See generally Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923 (1978); J. Ezell, *Fortune's Merry Wheel* 1-59 (1960); A. Spofford, *Lotteries In American History*, S. Misc. Doc. 57, 52d Cong., 2d Sess. 174-195 (1893); National Inst. of L. Enforcement & Crim. Just., LEAA, U.S. Dep't of Justice, *The Development of the Law of Gambling: 1776-1976*, at 500-519 (1977) [hereinafter *Gambling*]; G. Sullivan, *By Chance a Winner: The History of Lotteries* (1972); D. Weinstein & L. Deitch, *The Impact of Legalized Gambling: The Socioeconomic Consequences of Lotteries and Off-Track Betting* 8-9 (1974).

for a variety of reasons, including "animosity toward legislatively-created privilege, concern for efficiency in government, distaste for fraud and corruption, and sympathy for the poor upon whom the burden of the lottery system was thought to fall." [4] In fact, the dominant nineteenth century view was that lotteries were harmful to society.[5] The states therefore began to restrict or prohibit both private and state-run lotteries.

A major obstacle to the states' reform effort was their inability to regulate lotteries that operated across state lines. Because they lacked authority to prosecute lotteries conducted in another jurisdiction, or to regulate the use of the mails to distribute lottery tickets and advertisements, the states were forced to attack lotteries within their borders "at the consumer level—a difficult, expensive, and unpopular task." [6] The states therefore turned to Congress for assistance.

2. Congressional restrictions on the use of the postal service in connection with lotteries date from 1827. In that year, Congress prohibited postmasters from serving as lottery agents and from receiving "lottery schemes, circulars, or tickets" free of postage. Act of Mar. 2, 1827, ch. 61, § 6, 4 Stat. 238. Forty-one years later, Congress made it a crime to deposit in the mails "any letters

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[4] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 927.

[5] See, *e.g.*, *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 168 (1850), and *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1879), both quoted at pages 33-34, *infra*; *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321, 355 (1903) ("When enacting [the lineal predecessor to 18 U.S.C. 1301] Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court."); J. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897*, H.R. Misc. Doc. 210, 53d Cong., 2d Sess. Pt. 9, at 81 (1898) (Special Message to the Senate and House of Representatives from President Harrison) ("It is not necessary, I am sure, for me to attempt to portray the robbery of the poor and the widespread corruption of public and private morals which are the necessary incidents of these lottery schemes.").

[6] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 931.

or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. In 1872, Congress passed legislation prohibiting the mailing of letters or circulars concerning "illegal" lotteries. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302. Four years later, Congress struck that limitation, thereby extending the prohibition to all lotteries, including those chartered by state legislatures. Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 (codified at Rev. Stat. § 3894 (2d ed. 1878)). See *Horner* v. *United States*, 147 U.S. 449, 456, 466 (1893); *United States* v. *Noelke*, 1 F. 426, 428-429 (C.C.S.D.N.Y. 1880); *Lottery Circulars*, 15 Op. Att'y Gen. 203, 203-204 (1877).

The 1876 Act was soon challenged on the ground that it violated the First Amendment. This Court rejected that claim in *Ex parte Jackson*, 96 U.S. 727 (1877), which involved a prosecution for depositing in the mails a letter that contained a circular offering prizes in a lottery. The Court explained that "the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals." *Id.* at 736. Analogizing the 1876 Act to a similar 1873 law prohibiting the use of the mails to distribute obscene materials, the Court found that "[t]he same inhibition has been extended to circulars concerning lotteries, —institutions which are supposed to have a demoralizing influence upon the people." *Ibid.* And the Court concluded that "we have no doubt" that it was lawful for Congress to do so. *Id.* at 737.

The 1876 Act was nonetheless widely viewed as an ineffective weapon against lotteries. Its chief inadequacy was that it did not to apply to lottery advertisements contained in newspapers.[7] That shortcoming made the

[7] Lotteries often used newspaper advertisements to promote their games, since newspapers enjoyed second-class mailing privileges and

Act particularly ineffective against the powerful Louisiana Lottery, the only lottery still operating legally in 1890 when the predecessor to the statute at issue in this case was enacted.[8] The Louisiana Lottery operated nationwide and used the mails as its principal means of obtaining revenues from the public in other states,[9] deriving more than 90% of its multi-million dollar income from out-of-state bettors.[10] Because the Attorney General had concluded that the 1876 Act did not apply to newspapers,[11] however, that law did not prevent the

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were less expensive to distribute than letters containing lottery circulars, which would have been treated as first-class material. 21 Cong. Rec. 8714 (1890) (Rep. Evans); see the Classification Act of 1879, ch. 180, §§ 7 & 10, 20 Stat. 358, 359.

[8] *Exclusion of Lotteries from Postal Facilities*, 17 Op. Att'y Gen. 77, 77 (1881); see 21 Cong. Rec. 8714-8717 (1890) (summary of state laws prohibiting lotteries). The Louisiana Lottery was chartered in 1868 ostensibly to raise funds for Charity Hospital in New Orleans. In fact, however, the lottery was directed by a New York gambling syndicate, which had bribed Reconstruction Era state legislators in order to obtain a charter granting the lottery a monopoly position within the state. H. Asbury, *Sucker's Progress* 85 (1938); J. Ezell, *supra*, at 242-244; G. Sullivan, *By Chance a Winner: The History of Lotteries* 52-56 (1972).

[9] *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. 22, 46th Cong., 2d Sess. 16 (1880) (Letter from Postmaster-General Key to the House of Representatives); *id.* at 27-28 (Letter from New York City Post Office General Superintendent Forrester to New York City Postmaster James (Oct. 14, 1879)); *id.* at 28 (Letter from New Orleans Postmaster McMillen to Assistant Attorney General Freeman (Nov. 4, 1879)); *id.* at 28-29 (Letter from New Orleans Postmaster McMillen to Postmaster-General Key (Nov. 12, 1879)); 21 Cong. Rec. 8706 (1890); *id.* at 8711 (statement of Rep. Wilkinson); *id.* at 8717 (statement of Rep. Hitt); *id.* at 8721 (statement of Rep. Price); J. Ezell, *supra*, at 251.

[10] 21 Cong. Rec. 8706 (1890) (Rep. Moore); J. Ezell, *supra*, at 251; D. Weinstein & L. Deitch, *supra*, at 11.

[11] *Lotteries—Non-Mailable Matter*, 18 Op. Att'y Gen. 306, 309 (1885). The Attorney General concluded that a newspaper did not become a "circular" by publishing an advertisement. *Ibid.*

Louisiana Lottery from soliciting customers through newspaper advertising or other promotional devices.[12]

3. For several years, Congress considered the question whether the 1876 Act should be amended to include newspapers in order to curtail the nationwide operation of the Louisiana Lottery.[13] During that period, there was considerable debate on the question whether applying the 1876 Act to newspapers would violate the First Amendment. Supporters of the amendment argued that it was constitutional under this Court's decision in *Ex parte Jackson*[14] and noted that newspapers generally did not oppose extending the 1876 Act to include their publications.[15] Opponents claimed that *Ex parte Jackson* did not sanction the exclusion of newspapers from the mails, and that excluding newspapers from the mails because they published lottery advertisements would establish a precedent that in the future could be used to exclude from the mails commentary that other Congresses found detrimental to the public.[16] Supporters of the amendment ul-

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[12] Examples of contemporary advertisements and prize lists are found in Appendix B to this brief and at various pages in G. Sullivan, *supra*. See also *United States* v. *Noelke*, 1 F. at 428-429 (describing a similar advertisement).

[13] See generally J. Ezell, *supra*, at 251-263; *Gambling* 513-518; Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 937-940.

[14] See S. Rep. 1579, 51st Cong., 1st Sess. (1890); S. Rep. 233, 48th Cong., 1st Sess. 1 (1884); S. Rep. 11, 49th Cong., 1st Sess. 12 (1886); H.R. Rep. 2678, 49th Cong., 1st Sess. 1 (1886); H.R. Rep. 787, 50th Cong., 1st Sess. Pt. 2, at 2-4 (1888) (Views of the Minority); 21 Cong. Rec. 8710 (1890) (Rep. Caldwell); *id.* at 8712 (Rep. Wilkinson).

[15] See S. Rep. 1579, *supra*, at 3 ("Many of the ablest and most influential journals now advocate the denial of mail facilities of any publisher who will admit a lottery advertisement to his columns, and it is believed that an enactment by Congress to this effect will meet with the almost unanimous approval of papers of known standing and ability.").

[16] See S. Rep. 233, *supra*, at 13-15 (Views of the Minority); H.R. Rep. 826, 48th Cong., 1st Sess. 2-4 (1884); H.R. Rep. 2678, *supra*, at 4-6 (Views of the Minority); H.R. Rep. 787, *supra*, at 1.

timately carried the day, and the Fifty-First Congress enacted the Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465 (codified at Rev. Stat. § 3894 (Supp. 2d ed. 1891)), the lineal predecessor to the statute at issue in this case. In order to deny the Louisiana Lottery the use of the mails to attract customers, the Act outlawed the mailing of "any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing."

It was not long before the constitutionality of the new statute was also challenged, and in *In re Rapier*, 143 U.S. 110 (1892), this Court upheld the extension of the prohibition on mailing lottery advertisements and prize lists to newspapers. In that case, two defendants were convicted under the Act for mailing a newspaper containing an advertisement and a circular about the Louisiana Lottery. Relying on *Ex parte Jackson*, *supra*, this Court rejected the claim that the Act violated the First Amendment. As the Court explained (143 U.S. at 134-135):

> The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of maters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

Accord *Horner* v. *United States (No. 1)*, 143 U.S. 207, 213 (1892); *Horner* v. *United States (No. 2)*, 143 U.S. 570, 578 (1892) (both relying on *In re Rapier*).

Although the Louisiana Lottery ceased its operations in that state in 1893,[17] it set up new headquarters in Honduras and used a Florida express company for communications.[18] When Congress realized that the Louisiana Lottery had not yet been shut down, it passed the Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (codified as revised at 18 U.S.C. 1301), which made it a crime to transport lottery tickets in interstate commerce. The constitutionality of that Act was also challenged, and this Court once again upheld the statute in *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321 (1903), this time over a claim that the Act exceeded Congress's power under the Commerce Clause, Art. I, § 8, Cl. 3.

4. Congress has re-examined this regulatory scheme on several occasions in recent years. In 1975, following the rebirth of state-run lotteries in New Hampshire, New Jersey, and New York, Congress excluded from the scope of Section 1302 advertisements and prize lists in a newspaper published in a state which has a state-conducted lottery. 18 U.S.C. 1307. And only this year, Congress enacted additional exemptions for lotteries that are not illegal under state law and are conducted by a charitable organization or by a commercial organization as an occasional and ancillary promotional activity. Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, § 2 (Nov. 7, 1988). See H.R. Rep. 100-557, 100th Cong., 2d Sess. Pt. 1, at 1 (1988); 134 Cong. Rec. S16317-S16319 (daily ed. Oct. 14, 1988); *id.*

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[17] Some observers have concluded that the Anti-Lottery Act of 1890 was instrumental in bringing about the demise of the Louisiana Lottery. J. Ezell, *supra*, at 263-264; Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 940; see *Report of the Postmaster-General*, H.R. Exec. Doc. 1, 52d Cong., 1st Sess. Pt. 4, at 17 (1891).

[18] J. Ezell, *supra*, at 267-268; G. Sullivan, *supra*, at 58; D. Weinstein & L. Deitch, *supra*, at 12.

at H10445-H10446 (daily ed. Oct. 19, 1988). Those amendments do not take effect for 18 months, however, in order to give the states an opportunity to prohibit lotteries from operating or advertising. § 5; H.R. Rep. 100-557, *supra*, Pt. 1, at 3; 134 Cong. Rec. S16318 (daily ed. Oct. 14, 1988).[19] Congress also recently enacted the Indian Gaming Regulatory Act, Pub. L. No. 100-497 (Oct. 17, 1988). Section 21 of that law states that Section 1302 shall not apply to any gaming conducted by an Indian tribe pursuant to the Act.

Notwithstanding these exceptions, the basic prohibition originally enacted as the Anti-Lottery Act of 1890 survives as 18 U.S.C. 1302 para. 5. When applicable, that provision makes it a crime knowingly to mail "[a]ny newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance," or "any list of the prizes drawn or awarded" by means of any such

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[19] Even if the 1988 Act took effect immediately, it would not render this case moot, for several reasons. First, the district court's judgment held the prize list clause invalid in its entirety, and would therefore prevent the government from enforcing that provision of Section 1302 against an illegal numbers racket. The 1988 Act did not modify the terms or meaning of the prize list clause as it applies to such illegal lotteries. Second, the 1988 Act does not apply to non-exempt commercial lotteries, such as casinos, since those enterprises do not conduct lotteries simply as a "promotional activity" on a "clearly occasional and ancillary" basis, as Section 2(a) of the 1988 Act requires. See 134 Cong. Rec. S16318 (daily ed. Oct. 14, 1988) ("the committee wishes to make clear that no provision of [the bill] is intended to change current law as it applies to professional gambling activities"); *id.* at S16319 (same); *id.* at H3646 (daily ed. May 25, 1988) (House debate and passage of an amendment making clear that gambling casinos are not included within the new exemption). Finally, the 1988 amendments do not exempt lists of prizes awarded by state-run lotteries when published by a newspaper in a state that does not conduct such a lottery.

lottery or similar enterprise.[20] Under complementary provisions of the Postal Code, any material that is excluded from the mail under 18 U.S.C. 1302 is deemed to be "nonmailable" and subject to seizure. 39 U.S.C. 3001. Other provisions authorize the Postal Service to stop the delivery of lottery-related responses for, or the payment of money orders to, a person conducting a lottery, 39 U.S.C. (& Supp. IV) 3005; after an administrative proceeding, to return to a sender mail addressed to any person engaged in a lottery or scheme involving fraud or false representations, *ibid.*; and to sue in federal court and, on a showing of probable cause, obtain a preliminary injunction detaining the incoming mail of a person alleged to be engaged in a lottery or similar scheme, pending the conclusion of such administrative proceedings, 39 U.S.C. 3007.

B. Proceedings Below

Appellee Minnesota Newspaper Association, Inc., is an organization of general and special interest newspapers published in Minnesota. Appellee's members distribute a significant portion of their circulation through the mails. J.A. 3. Minnesota law allows non-profit charitable organizations to operate gaming activities for fund-raising purposes. J.S. App. 1a-2a. Appellee's members wanted to publish advertisements and news stories about such lotteries, but were afraid to do so because of uncertainty about the meaning of 18 U.S.C. 1302, and 39 U.S.C. (& Supp. IV) 3001 and 3005, and because of warnings they had received from local postal inspectors that they could be prosecuted for mailing lottery-related materials. J.S.

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[20] Related provisions of Title 18 include: Section 1301, which prohibits the importation or transportation of lottery tickets, advertisements, or lists of prizes; Section 1303, which prohibits any Postal Service officer or employee from acting as a lottery agent; Section 1304, which prohibits broadcasters from broadcasting lottery advertisements, prize lists, or information; Section 1305, which creates a special exemption for fishing contests; and Section 1306, which prohibits financial institutions from selling lottery tickets.

App. 2a-3a. Appellee therefore brought this action to challenge the constitutionality of those laws under the First Amendment and Due Process Clause.

The district court granted partial summary judgment in favor of each party. The court first held that lottery advertisements (including advertisements containing prize lists) are "commercial speech," and that the advertising restrictions in Section 1302 are valid under *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986). J.S. App. 7a-13a. Although the court found the advertisements that appellee's member newspapers sought to publish concerned lawful activity that is not inherently misleading (*id.* at 8a), the court ruled that the statutory restrictions are valid because they directly advance two substantial governmental interests: Congress's interest in preserving the states' power to prohibit or limit gambling within their borders, and Congress's interest in restricting the interstate growth of private lotteries in order to reduce the threat of organized criminal involvement in gambling. *Id.* at 8a-13a. The court also held that Section 1302 does not apply to general news reports or editorial commentary about lotteries. Those materials, the court held, can be distributed through the mails. J.S. App. 16a.

Nonetheless, the court concluded that the prize list clause of Section 1302 is unconstitutional. J.S. App. 13a-15a. The court recognized that a list of prize winners is an effective promotional device for a lottery, but ruled that such a list is not commercial speech unless it is part of an advertisement. *Id.* at 13a-14a. Because Section 1302 independently forbids the mailing of advertisements promoting lotteries, the court held that the prize list clause was designed to restrict the publication of prize lists in noncommercial speech and was invalid unless the restriction was narrowly tailored to serve a compelling governmental interest. *Id.* at 14a. Finding that the in-

terests promoted by Section 1302 were not compelling, the court held the prize list clause was unconstitutional, but could be severed from the remainder of the statute. *Id.* at 14a-15a, 16a. The court acknowledged that its holding was inconsistent with this Court's decision in *In re Rapier*, but concluded that the rationale of that decision had been superseded by this Court's more recent First Amendment decisions. J.S. App. 15a.[21]

The district court accordingly entered a judgment declaring, inter alia, that "the restrictions in 18 U.S.C. § 1302, and its implementing regulations, on the mailing of lists of prizes awarded from a lottery are unconstitutional." J.S. App. 20a. The court's judgment also permanently enjoined appellants "from further enforcement of the restrictions on prize lists." *Ibid.*; *id.* at 21a-22a.

SUMMARY OF ARGUMENT

1. The prize list clause in 18 U.S.C. 1302 applies only to prize lists that are commercial speech. The district court erred in equating advertisements and commercial speech since that equation is both overinclusive and underinclusive. Political commentary, which is not commercial speech, can be presented in an advertisement. On the other hand, a draft contract, which surely is commercial speech, does not resemble an advertisement. The correct analysis for determining whether such materials are commercial speech is to examine the subject matter of the expression (*i.e.*, whether it promotes or advances a commercial transaction); the relationship between the speaker, the subject matter, and his audience (*i.e.*, whether the speaker has a financial interest in the com-

[21] The court also rejected appellee's equal protection challenge to the advertising restriction of 18 U.S.C. 1302, on the ground that the distinctions complained of were rationally related to legitimate government interests. J.S. App. 17a-19a. Finally, the court ruled that 39 U.S.C. (& Supp. IV) 3001 and 3005 could not be applied to restrict the mailing of newspapers containing prize lists in news reports. J.S. App. 19a.

mercial transaction or in its promotion); and the form that the speech takes (*i.e.*, whether it is an advertisement), instead of relying on the last criterion alone.

The text, background, and purposes of the Anti-Lottery Act of 1890 show that the prize list clause was designed to reach only what would today be called commercial speech. The Act was passed to close the mails to the Louisiana Lottery, a large-scale gambling syndicate and the only legal lottery still operating in 1890. Prize lists and advertisements were sometimes separately distributed by lotteries, and the two clauses were designed to capture both types of promotional materials. This Court ruled in *Horner* v. *United States*, 147 U.S. 449 (1893), that the prize list clause covers such lists when distributed for commercial purposes. It was that type of expression that Congress sought to reach by the Act, not news stories. That construction of the Act also avoids the constitutional issues raised by the district court's interpretation of the prize list clause.

2. Because Section 1302 prohibits the mailing of only what would today be called commercial speech, it is constitutional under the standards this Court has announced for determining the permissible bounds of the regulation of commercial speech. The Act reasonably and directly promotes the same type of interests this Court found legitimate in *Posadas*. By limiting the commercial promotion of lotteries, the act protects the policies of those states that have forbidden private lotteries within their borders. And by restricting the growth of private lotteries, it also reduces the threat of organized criminal infiltration of gambling enterprises and makes it easier for states that permit lotteries to police that activity. The act therefore advances principles of federalism by assisting states that have determined that private lotteries are contrary to public policy to implement that judgment. Section 1302 directly furthers those interests, because it was reasonable for Congress to believe that

restricting the promotion of lotteries through the mails would reduce the consumer demand for that activity. Finally, the restrictions imposed by that act are no more extensive than necessary, because they are limited to commercial speech. In sum, the Act excludes from the mails only a narrow category of commercial speech that plays a direct and integral role in the conduct of an activity that Congress and the states may discourage or suppress due to its potentially injurious effect on the public.

ARGUMENT

THE RESTRICTIONS IN 18 U.S.C. 1302 ON THE USE OF THE MAILS TO PROMOTE LOTTERIES ARE A LAWFUL REGULATION OF COMMERCIAL SPEECH

There is a longstanding federal policy against the use of the mails to promote private lotteries. It is illegal to send tickets for private lotteries in interstate or foreign commerce, 18 U.S.C. 1301, or to distribute through the mails lottery tickets or publications containing advertisements about lotteries or lists of the prizes they award. 18 U.S.C. 1302. This Court upheld the constitutionality of this regulatory scheme nearly a century ago in three separate decisions. The Court twice rejected First Amendment challenges to the predecessor versions of Section 1302 in *Ex parte Jackson*, 96 U.S. 727 (1877), and *In re Rapier*, 143 U.S. 110 (1892), and the Court turned aside a Commerce Clause challenge to the predecessor to Section 1301 in *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321 (1903).

The district court upheld against a First Amendment claim the clause in Section 1302 that prohibits the distribution through the mails of publications that contain lottery advertisements. The court held that the advertisement clause is a reasonable restriction on the use of

the mails to promote lotteries.[22] At the same time, however, the court struck down as facially unconstitutional the parallel clause in the law that prohibits the distribution through the mails of publications containing lists of prizes awarded by lotteries. The court ruled that the prize list clause was designed to and in fact would restrict the distribution through the mails of news reports about lotteries.[23] In our view, the court correctly upheld the advertisement clause, but erred by striking down the prize list clause, since it misinterpreted the scope of the latter. When properly construed, the prize list clause is a reasonable regulation of the commercial promotion of lotteries.

I. SECTION 1302 REGULATES THE DISTRIBUTION THROUGH THE MAILS OF COMMERCIAL SPEECH PROMOTING LOTTERIES

A. "Commercial Speech" Is Not Limited To Traditional Forms Of "Advertising" And Embraces Other Types Of Expression That Are Integrally Related To A Commercial Transaction

1. The threshold issue in this case is what type of speech Congress sought to regulate through 18 U.S.C. 1302, since not all forms of expression are entitled to equal constitutional protection. Speech that is obscene or libelous, for example, is not protected by the First Amendment. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942). By contrast, political debate and com-

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[22] The United States District Court for the District of Columbia has also upheld the advertisements clause over a similar First Amendment challenge. *Aimes Publications, Inc.* v. *United States Postal Service*, Civ. No. 86-1434 (D.D.C. Feb. 23, 1988).

[23] Appellee did not urge the district court to read the prize list clause in that manner; it only expressed uncertainty about the scope of the act. Plaintiff's Memorandum in Response 13 (dated Sept. 9, 1987). The Minnesota Civil Liberties Union, appearing as amicus curiae, argued that the prize list clause was applicable to news stories. Amicus Minnesota Civil Liberties Union's Memorandum in Support of Plaintiff's Motion for Summary Judgment 7 (dated Aug. 28, 1987).

mentary on matters of public concern fall within the core idea of expression protected by the First Amendment, and the government may not prohibit such speech absent a compelling justification and a precise limitation on what is forbidden. *Meyer* v. *Grant*, No. 87-920 (June 6, 1988); *Boos* v. *Barry*, No. 86-803 (Mar. 22, 1988). What has come to be known as commercial speech falls between those boundaries.

Commercial speech is entitled to some protection due to its informational value in a free market economy. See *In re R.M.J.*, 455 U.S. 191, 200 n.11 (1982) ("The commercial speech doctrine is itself based in part on certain empirical assumptions as to the benefits of advertising."); *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Nevertheless, the application of the First Amendment to commercial speech "has been recognized generally as a substantial extension of traditional free-speech doctrine which poses special problems not presented by other forms of protected speech." *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979). Commercial speech therefore occupies a "subordinate position in the scale of First Amendment values" (*Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)), and due recognition must be given to the various "commonsense" differences between commercial speech and commentary on matters of public concern. *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24.

The Court has explained that a commercial speaker ordinarily has extensive knowledge of his product and the market, and speech connected with commercial transactions is generally calculated rather than spontaneous. Commercial speech is therefore more easily verifiable than classic political commentary. Commercial speech is also more durable than political commentary, since it is the offspring of economic self-interest, and thus is less

likely to be unduly chilled by governmental regulation. It is also well settled that the government does not lose its power to regulate commercial activity it deems harmful to the public simply because speech is a component of that activity. *Friedman* v. *Rogers*, 440 U.S. at 10-11 n.9; *Ohralik*, 436 U.S. at 456; *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Regulation directed at the sale of goods and services could well be ineffectual if the government could not also regulate the speech used in the promotion of those transactions. Finally, because commercial speech occurs in areas traditionally subject to government regulation (such as labor relations), requiring parity of treatment between commercial speech and political speech could dilute the protection afforded the latter. See *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 505 & n.12 (1981) (plurality opinion); *Central Hudson*, 447 U.S. at 562-564 & nn.5-6; *Friedman* v. *Rogers*, 440 U.S. at 10 & n.9; *Virginia Pharmacy Bd.*, 425 U.S. at 771-772 & n.24; *id.* at 777-781 (Stewart, J., concurring); see *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 758-763 & n.5 (1985) (plurality opinion); cf. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, No. 86-270 (June 25, 1987), slip op. 11-18 & n.16.

2. The district court held that the constitutionality of the advertisement clause of 18 U.S.C. 1302 must be considered under the lower degree of protection appropriate for commercial speech. That ruling is correct, as shown below. Nonetheless, the district court held that the prize list clause of that statute is not limited to commercial speech. Because the statute contains separate clauses prohibiting the mailing of lottery advertisements and lists of prizes, and because a prize list contained in an advertisement would be independently covered by the advertisement clause, the court reasoned that the prize list clause must apply to noncommercial speech, such as news stories about lottery winners. J.S. App. 13a-14a. The

court therefore concluded that the prize list clause must be measured against the higher standard of review that is appropriate for noncommercial speech. *Id.* at 14a-15a.

The fatal flaw in the district court's reasoning is the unstated assumption that "commercial speech" is exactly coterminous with "advertising." Relying on that assumption, the court reasoned that a law directed at a specific type of expression (here, speech designed to promote a lottery) can be measured against the limited standard of protection afforded to commercial speech only if the targeted expression is contained in what would ordinarily be termed an "advertisement." That assumption, however, which underlies the district court's entire analysis of the prize list clause in Section 1302, is erroneous. Once that assumption is removed, it is evident that both the advertisement and prize list clauses are aimed at slightly different but closely related forms of commercial speech. The prize list clause is therefore valid for the same reasons that support the advertisement clause.

Most of the Court's commercial speech cases have involved expression that would ordinarily be called "advertising pure and simple." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). In those cases, the Court has always treated such forms of expression as commercial speech. At the same time, however, the Court has never equated commercial speech with advertisements, and with good reason. Any such equation would be both overinclusive and underinclusive. It would be overinclusive because advertisements are often used to promote political candidates or ideas, or to identify matters of public debate and concern. For example, the allegedly libelous advertisement in *New York Times Co.* v. *Sullivan*, 376 U.S 254, 266 (1964), was described by the Court as one that "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the

highest public interest and concern." That advertisement was clearly not regarded by the Court as a form of commercial speech, and it is easy to imagine similar examples. Equating advertising with commercial expression also would be underinclusive, since it would exclude certain types of expression that are not ordinarily characterized as advertising, but are integrally related to a commercial transaction. A proposed contract is one example, but there are others that also fit easily into this category, such as "the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees" (*Ohralik*, 436 U.S. at 456 (citations omitted)), labor picketing designed to encourage a secondary boycott (*NLRB* v. *Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980)), and efforts to persuade a private standard-setting organization to exclude a competitor's product. *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, No. 87-157 (June 13, 1988). None of those types of expression is entitled to the same degree of protection as political dialogue and commentary.

Rather than formalistically limit commercial speech to advertising, this Court has identified "the core notion of commercial speech" (*Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983)) as those forms of speech that do "no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).[24] In determining

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[24] See also, *e.g.*, *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 340 (1986); *Youngs Drug Products Corp.*, 463 U.S. at 66; *In re R.M.J.*, 455 U.S. at 204 n.17; *Virginia Pharmacy Bd.*, 425 U.S. at 762; see *Central Hudson*, 447 U.S. at 561 (commercial speech is "related solely to the economic interests of the speaker and its audience"); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (commercial speech "inform[s] private economic decisions" and is "primarily concerned with providing information about the characteristics and costs of goods and services").

whether a particular form of expression is commercial speech, the Court has also considered such factors as whether the speech takes the form of a commercial advertisement, whether it refers to a specific product, whether the speaker is motivated by economic gain, and whether the activity promoted by the expression is itself constitutionally protected or may be forbidden due to its injurious effects. *Youngs Drug Products*, 463 U.S. at 66-67 & nn.13-14. See also *Pittsburgh Press*, 413 U.S. at 387-388 (looking to the format in which the speech appears). In a related context, the Court has explained that the determination whether speech involves a matter of public or private concern must focus on the "content, form, and context" of the expression "as revealed by the whole record." *Dun & Bradstreet*, 472 U.S. at 761 (plurality opinion) (quoting *Connick* v. *Myers*, 461 U.S. 138, 147-148 (1983)).

Youngs Drug Products and *Dun & Bradstreet* illustrate the proper analysis. In *Youngs Drug Products*, the Court concluded that drugstore flyers consisting primarily of price and quantity information about prophylactics clearly were proposals to engage in commercial transactions and thus fit within the core notion of commercial speech. In addition, however, the firm's informational pamphlets, which not only described the firm's products, but also discussed family planning, veneral disease, and the use and advantages of prophylactics in preventing such disease, were also deemed to be commercial speech. The format of the pamphlets, their identification of the speaker's particular product, and the economic motivation underlying their publication all suggested that the pamphlets were properly considered commercial speech. 463 U.S. at 67-68.[25]

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[25] That was true even though the pamphlets discussed important social issues. "A company has the full panopoly of protections available to its direct comments on public issues," the Court explained, "so there is no reason for providing similar constitutional protection when such statements are made in the context of com-

Similarly, *Dun & Bradstreet* involved the question whether financial reports prepared by a private credit reporting agency about private firms were matters of public concern and therefore were entitled to the same measure of First Amendment protection afforded to such expression in libel actions. A plurality of this Court concluded that, although the expression at issue did not constitute economic or commercial speech, "many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well." 472 U.S. at 762 n.8. Relying upon the Court's commercial speech decisions, the plurality found that the credit reports did not involve matters of public concern, for several reasons: They communicated information of interest solely to the credit reporting agency and its specific business audience; they were distributed to a limited audience; like advertising, they were unlikely to be chilled by incidental state regulation, since they were created for profit; they were arguably more objectively verifiable than other forms of speech; and, finally, they

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mercial transactions." 463 U.S. at 68 (footnote omitted). See also *Central Hudson*, 447 U.S. at 562-563 n.5. Cf. *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) ("[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication").

Youngs Drug Products also stated that other factors might be relevant in a particular case. For example, the Court noted that expression might constitute commercial speech even if it only refers to a generic product, because a company with a large market share or a trade association might be able to a promote an item without reference to brand names. 463 U.S. at 66-67 n.13. Another consideration, the Court noted, is whether a publication advertised an activity that is itself protected by the First Amendment. *Id.* at 67 n.14. See *Posadas*, 478 U.S. at 345-346 (distinguishing *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977), and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), on the ground that in those cases "the underlying conduct was constitutionally protected and could not have been prohibited by the State"). Finally, *Youngs Drug Products* noted that expression could be commercial even if it did not have all of the characteristics that were present in that case. 463 U.S. at 66-67 n.13.

were likely to be influenced by market forces. *Id.* at 762-763.

Youngs Drug Products and *Dun & Bradstreet* suggest that the key elements of commercial speech are (a) its subject matter, *i.e.*, whether it promotes or advances an ordinary commercial transaction; (b) the relationship between the speaker, the subject matter, and his audience, *i.e.*, whether the speaker has a direct financial interest in either the transaction or its promotion; and to a lesser degree (c) its format, *i.e.*, whether the speech appears in a form traditionally regarded as commercial advertising. The first element limits the definition of commercial speech to speech about commercial products and services, and excludes speech about a constitutionally protected activity, since that expression draws additional value from the underlying activity. The second element, the financial interest of the speaker in the good or transaction, is critical, because, as this Court has noted, a party with a financial interest in a good or service (or in the promotion of that item) is likely to be able to verify the accuracy of the information he distributes and is less likely to be chilled by government regulation than is a financially disinterested commentator. Finally, although the question whether particular speech is commercial cannot be answered simply by determining whether it is formally called advertising, that factor is also relevant, because what would ordinarily be called an advertisement is often the vehicle for the distribution of commercial speech. The use of that format therefore counsels in favor of treating particular speech as commercial.

B. The Prize List Clause, Like The Advertisement Clause, Regulates Only The Use Of The Mails For The Commercial Promotion Of Lotteries

We submit that the prize list clause of Section 1302, when read in light of the text, background, and purposes of the Anti-Lottery Act of 1890, should be construed to apply only to prize lists that constitute commercial

speech. That is, the act should be read to apply only to prize lists that serve to promote or advance a lottery where the speaker either has a financial interest in the lottery itself or has been paid directly to promote it. When read in that manner, the prize list clause covers a form of speech different than advertisements, but nevertheless is still limited to what the Court has identified as commercial speech.

1. The text of the statute is fully consistent with this construction. To begin with, Section 1302 does not support the district court's fear that the prize list clause might apply to news stories or editorials about lotteries. News reports and commentary are not mentioned among the items to which the statute applies. Although such speech could conceivably contain a list of the prizes won in a lottery, Congress was concerned with a different type of expression. Three examples of the types of promotional materials distributed at the time the Anti-Lottery Act of 1890 was adopted are reprinted in an appendix to this brief. App., *infra*, 11a-14a. Those examples are significant for two reasons. First, they reveal that advertisements and prize lists were separately published during that period.[26] Second, these examples suggest that the reason Congress added a separate clause dealing with prize lists was to ensure that the Act applied to circulars and other promotional devices that would not necessarily be considered advertisements, but would contain a

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[26] Although the contemporaneous examples suggest that Congress was primarily concerned with the publication of lists of prizes to be awarded at future drawings of a lottery, the language of the statute is not so limited. Thus, we believe that the statute should be read as prohibiting the use of the mails to distribute lists of prizes previously awarded in a lottery as well as lists of future prizes. Indeed, if the statute were limited to lists of future prizes, it would be relatively easy to evade its terms by publishing lists of past prizes and indicating that similar prizes would be awarded in the future.

list of what a bettor could win.[27] In sum, these promotional materials demonstrate that the advertisement and prize list clauses were designed to apply to what would today be called commercial speech, not to news commentary.

The fact that Section 1302 refers to lottery advertisements and prize lists in tandem strongly indicates that the two clauses should be read in a complementary fashion. *Third National Bank* v. *Impac Ltd.*, 432 U.S. 312, 322 (1977); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893).[28] That construction of the Act is also reasonable. Lotteries, like the various other forms of gambling, often use prize lists for the same purpose as advertisements: to attract participants. By identifying prizes that will be (or have been) awarded in a lottery, a prize list promotes the future sales of lottery tickets. A prize list can also serve as a device for notifying winners, a function essential to the conduct of a lottery. The prize list clause therefore should be read as applying to the same type of conduct as the advertisement clause: to the

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[27] Some lottery sponsors may not have included a list of their prizes in every circular. For example, the Postmaster General reported that the National Banking Company issued bonds on the drawings of the Louisiana, Havana, and Kentucky lotteries and that one of its circulars said: "Circulars containing list of securities dealt in, with full and explicit information, sent free." *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. 22, *supra*, at 9.

[28] "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. at 307. That maxim stated a "familiar" rule that was "applicable to all written instruments" in 1893. *Virginia* v. *Tennessee*, 148 U.S. at 519. It is reasonable to assume that Congress was aware of that rule when it enacted the Anti-Lottery Act of 1890 and to interpret Section 1302 with that rule in mind.

use of the mails to promote a lottery for profit by one who has a direct financial interest in the lottery or its promotion.

2. History also supports that conclusion. In construing a statute, "'[c]ourts may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it.'" *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 669 (1979) (citation omitted). The background to the Anti-Lottery Act of 1890 confirms that Congress did not adopt the Act in order to deny newspapers the use of the mails for publishing news stories or commentary about lotteries.

The target of the Anti-Lottery Act of 1890 was the Louisiana Lottery, not newspapers. The Act was adopted in order to bring a halt to that lottery, a multi-million dollar nationwide gambling enterprise that was the only lottery still operating legally in 1890 and that received more than 90% of its income from out-of-state bettors. Newspapers were included among the types of publications covered by the Act for one simple reason: They were a relatively inexpensive way to distribute lottery advertisements, and the Attorney General had concluded that the 1876 Act did not cover newspapers that published lottery advertisements. Congress found that the only effective way to suppress the Louisiana Lottery—to "cut [it] down to a mere local gambling establishment, answerable to the police powers of the local government" (21 Cong. Rec. 8717 (1890) (Rep. Hitt))—was to exclude from the mails newspapers and all other publications that contained its advertisements and related promotional materials and thereby to deny the Louisiana Lottery access to its primary source of income. The references in Section 1302 to "any advertisement of any lottery" and to "any list of the prizes drawn

or awarded by means of any such lottery" should be read in light of that overriding purpose.[29]

3. Further support for that interpretation of the prize list clause is found in this Court's contemporaneous decision in *Horner* v. *United States*, 147 U.S. 449 (1893). *Horner* involved a prosecution under the Anti-Lottery Act of 1890 for mailing a circular describing government bonds whose redemption value hinged on the date that the bonds were chosen for repayment. One of the questions was whether the circular " 'constitute[d] a list of the drawings at any lottery or similar scheme' " for purposes of the Act. 147 U.S. at 455 (quoting certified question). The circular contained a list of the bonds and the amount of money awarded. That list was not remotely

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[29] As previously noted, Congress expressly considered the question whether the prohibitions of the Anti-Lottery Act would infringe on the First Amendment, and concluded that they would not. As Representative Wilkinson explained (21 Cong. Rec. 8712 (1890)):

> It is said also that this is a blow at the freedom of the press, which, with freedom of speech, Congress is forbidden by the first amendment to the Constitution to make any abridgement of.
>
> Sir, if this is a blow against the freedom of the press it is such a blow as the State of New York has struck where lottery advertisements are forbidden in the newspapers. It is such a blow as other States in this Union have struck who have done likewise, but I have never yet heard it has there been considered a blow at the freedom of the press. The freedom of the press, as I understand it, consists in the right of the editor of the newspapers to freely express their views on public questions without let or hinderance by those in authority. It means to forbid that censorship of the press once so prevalent in European countries and still common in those countries, but this matter of advertisements seems to me to be a different affair. I hold in my hand as good a paper, as well supplied with news, as interesting a paper to read, perhaps, as any in the United States, a paper which is published in a State where lottery advertisements are forbidden and where no newspaper dare to print one, and it seems to thrive and prosper and makes no complaint that its rights have been interfered with.

similar to what would be called a "news story," but was virtually identical to the example of a contemporary prize list reprinted in the appendix to this brief. *Id.* at 451-453 n.1.[30] The Court found that the circular contained a list of the prizes awarded by a lottery. *Id.* at 467. Clearly, it was promotional material similar to that described in *Horner*, not a news report about a lottery, that Congress had in mind when it enacted the Anti-Lottery Act of 1890. See also *United States* v. *Politzer*, 59 F. 273, 277 (N.D. Cal. 1893) (applying *Horner* to a similar publication). See *France* v. *United States*, 164 U.S. 676 (1897), and *Francis* v. *United States*, 188 U.S. 375 (1903) (prosecutions under the Anti-Lottery Act of 1890 for gambling activities that would today be called "numbers" or "policy").

That Section 1302 does not reach all types of information about lotteries can also be seen when that law is compared with the parallel statute regulating the broadcasting of lottery-related information, 18 U.S.C. 1304, which was enacted as part of the Communications Act of 1934, 47 U.S.C. (& Supp. III) 151 *et seq.* Section 1304 prohibits broadcasting "any advertisement of *or information concerning* any lottery * * * or any list of the prizes drawn or awarded by means of any such lot-

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[30] The circular was reprinted in a footnote in the Court's opinion. It contained a list of the bonds that had been chosen (147 U.S. at 451 n.1) and a list of money awarded (*id.* at 453 n.1):

On one bond	250,000 gulden
On one bond	25,000 gulden
On one bond	15,000 gulden
On one bond	10,000 gulden
On 2 bonds, each at 5000 gulden	10,000 gulden
On 3 bonds, each at 2000 gulden	6,000 gulden
On 6 bonds, each at 1000 gulden	6,000 gulden
On 15 bonds, each at 500 gulden	7,500 gulden
On 30 bonds, each at 400 gulden	12,000 gulden

Compare the promotional materials distributed by the Louisiana Lottery. App., *infra*, 11a-12a.

tery * * * whether such list contains any part or all of such prizes" (emphasis added). The term "any * * * information" clearly includes matters that are not covered by the terms "advertisement" and "prize list" that also appear in the Act.[31] Section 1304 therefore shows that Congress knows how to draft a statute containing a more expansive ban on the distribution of lottery-related information when it wishes to do so, and that Section 1302 does not cover every type of information about lotteries.

Finally, construing Section 1302 to reach only commercial speech is not "plainly contrary to the intent of Congress" (*DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, No. 86-1461 (Apr. 20, 1988), slip op. 6), and it avoids the constitutional issues raised by the district court's interpretation of the Act. *Ibid.*; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501 (1979); *United States* v. *12 200-Ft. Reels of Super 8MM.*

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[31] The legislative history of Section 1304 suggests that the term "any * * * information" was intentionally added to broaden the scope of that law. The House used the phrase "any information," not "advertisement," in its version of a bill that was designed to modify the Radio Act of 1927, ch. 169, 44 Stat. 1162. H.R. Rep. 221, 72d Cong., 1st Sess. 7, 8 (1932). The Senate, however, substituted the term "advertisement" for "information" in order to "more nearly place[] radio stations on the same basis as newspapers in connection with broadcasting information as to lotteries." S. Rep. 564, 72d Cong., 1st Sess. 10 (1932); S. Rep. 1004, 72d Cong., 2d Sess. 12 (1932); S. Rep. 1045, 72d Cong., 2d Sess. 11 (1933). The Conference Committee resolved the dispute by using both terms in the Act. H.R. Conf. Rep. 2106, 72d Cong., 2d Sess. 3, 6 (1933); 76 Cong. Rec. 5204 (1933) (Sen. Dill). That bill was pocket vetoed by President Hoover, but the identical provision became law the following year in the Communications Act of 1934 (see S. Rep. 781, 73d Cong. 2d Sess. 8 (1934); H.R. Conf. Rep. 1918, 73d Cong., 2d Sess. 26, 49 (1934)), and is now codified at 18 U.S.C. 1304.

Of course, the fact that Section 1304 includes more types of commercial speech than Section 1302 does not mean that Section 1304 should be read to apply to noncommercial speech, such as news stories or editorials about lotteries. Just as Section 1302 should be read in a manner consistent with the First Amendment, so too Section 1304 should be read in that manner.

Film, 413 U.S. 123, 130 n.7 (1973). For example, in the *12 200-Ft. Reels of Film* case the Court said (413 U.S. at 130 n.7) that it would interpret the term "obscene" in a federal statute prohibiting the importation of obscene material in a manner consistent with the definition of obscenity adopted in *Miller* v. *California*, 413 U.S. 15, 25 (1973). A similar analysis is appropriate in this case.

4. In sum, the district court erred in concluding that commercial speech and advertising are coterminous and that a law regulating something other than advertising cannot be regarded as a regulation of commercial speech. The prize list clause of Section 1302 can and should be read to apply only to a form of commercial speech, *i.e.*, the publication of a list of prizes awarded by a lottery when the list is published by a party who has a direct financial interest in the lottery or its promotion.[32] Thus, if a newspaper published a list of lottery prizes because it expected to receive a share of the lottery's proceeds or because the newspaper sponsored the lottery itself, such a list would be covered by Section 1302, because it would be speech related to a commercial transaction in which the newspaper has a financial interest. Similarly, if a newspaper were paid to publish a list of lottery prizes, that list would be covered by the statute, because it would be speech about a commercial transaction that the newspaper had been paid to promote.

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[32] Indeed, a list of the prizes to be awarded at a future drawing of a lottery may be regarded as an implicit proposal to engage in a commercial transaction and therefore as falling within what this Court has identified as "the core notion of commercial speech." *Youngs Drug Products*, 463 U.S. at 66. See *Central Hudson*, 447 U.S. at 580 (Stevens, J. concurring in the judgment) ("A salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept.") (footnote omitted).

On the other hand, Section 1302 should not be read to apply to other forms of commentary about lotteries, such as editorials, news stories, or documentaries. If a newspaper published a list of lottery prizes because it believed that the list was newsworthy or because it sought, for altruistic reasons, to promote a lottery's success, that list would not amount to commercial speech. That would follow even if the newspaper published the list because the publisher hoped to increase its circulation and thereby generate additional revenues. The profit motive of a newspaper publisher does not itself render a newspaper's contents commercial speech (*Pittsburgh Press*, 413 U.S. at 384-385; *New York Times Co.* v. *Sullivan*, 376 U.S. at 266) and therefore does not transform the publication of information about a future lottery into a violation of Section 1302. When the prize list clause in Section 1302 is construed in the foregoing manner, that clause is constitutional for the same reasons given by the district court for upholding the advertisement clause.

II. SECTION 1302 IS A REASONABLE REGULATION OF COMMERCIAL SPEECH

This Court has held that commercial speech is entitled to a limited degree of First Amendment protection provided it concerns a lawful activity and is not misleading or fraudulent. Nevertheless, the Court has made clear that even commercial speech that truthfully promotes a lawful activity may be regulated, both as to the time, place, and manner of its dissemination and as to its content, in ways and for reasons that cannot be applied to other types of speech. The government may restrict commercial speech if the government's interests are substantial, if the restriction directly advances those asserted interests, and if the restriction is no more extensive than necessary to serve those interests. *Central Hudson*, 447 U.S. at 564. Under this standard, commer-

cial speech may in some cases be prohibited altogether—not despite, but precisely because of, its content. *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986) (gambling advertising); *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N.E. 2d 138, appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982) (alcohol advertising); *Pittsburgh Press* (advertising that includes gender discrimination); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), aff'd summarily *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000 (1972) (broadcast cigarette advertising). Under those decisions, the prize list clause, like the advertisement clause, is a valid regulation of commercial speech.

A. Section 1302 Directly Promotes Several Legitimate Governmental Interests

The first step in the inquiry is whether the government has a substantial interest in restricting the speech. *Posadas*, 478 U.S. at 340-341; *Central Hudson*, 447 U.S. at 566. Section 1302 easily passes that test, since it regulates expression promoting an activity that Congress and the states may discourage or suppress due to its potentially injurious effects.

1. *Section 1302 may be applied to prohibit the use of the mails to promote an illegal lottery*

Section 1302, by its terms, applies to both legal and illegal lotteries, as this Court recognized in *Horner* v. *United States*, 147 U.S. at 456, 466. To the extent that the Act applies to lotteries that are illegal under federal or state law, it is clearly valid, since the government may regulate or ban entirely speech proposing an illegal transaction. *E.g.*, *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Central Hudson*, 447 U.S. at 563-564; *Pittsburgh Press*, 413 U.S. at 388.

That alone is sufficient to uphold the advertisement and prize list clauses against a facial challenge.[33]

2. *Section 1302 may be applied to prohibit the use of the mails to promote a lottery that is legal under federal or state law*

a. Aside from preventing the promotion of illegal lotteries, Section 1302 furthers other legitimate governmental interests, as the district court explained. J.S. App. 8a-11a. First, it protects the policies of those states that have forbidden private lotteries from operating within their borders. Second, by restricting the growth of private lotteries, it reduces the threat of organized

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[33] In this respect, the district court's judgment holding invalid the prize list clause in Section 1302 goes well beyond decisions of the Second and Third Circuits concerning the constitutionality of the related broadcasting provision, Section 1304. The Second Circuit in *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (1969), cert. denied, 396 U.S. 1061 (1970), upheld the constitutionality of Section 1304 as applied to information directly promoting a state-conducted lottery. Although the Third Circuit in *New Jersey State Lottery Comm'n* v. *United States*, 491 F.2d 219 (1974) (en banc), vacated and remanded, 420 U.S. 371 (1975), held that Section 1304 would be unconstitutional if it were applied to prohibit the broadcasting of a winning lottery number in a lawful, state-conducted lottery, the court held that the statute could constitutionally be applied to compensated broadcasts, and possibly to some uncompensated promotional advertisements beyond the context of broadcast journalism. 491 F.2d at 222. This Court granted certiorari to review the Third Circuit's decision, but later dismissed the case as moot after Congress enacted 18 U.S.C. 1307, which exempts state-run lotteries from Section 1304. *United States* v. *New Jersey State Lottery Comm'n*, 420 U.S. 371 (1975).

Under the district court's judgment in this case, which invalidated the prize list clause in its entirety, J.S. App. 20a, the Postmaster could not apply the prize list clause to any type of publication, including circulars prepared and disseminated by the sponsors of an illegal numbers racket. Both the Second and Third Circuits, however, would uphold Section 1302 if it were applied in that manner.

criminal infiltration of gambling enterprises and makes it easier for the states that permit lotteries to police that activity. The statute therefore advances principles of federalism by allowing those states that have determined that private lotteries are contrary to public policy to implement that judgment.[34]

Those interests are "substantial" under *Central Hudson*. The states clearly may protect the welfare of their citizens against the harms historically associated with gambling. Opponents of gambling have long argued that it contributes to corruption and the growth of organized crime; that it underwrites bribery, narcotics trafficking, and other crimes; that it imposes a regressive tax on the poor, the persons who are least able to bear that burden; and that it offers a false but sometimes irresistible hope of financial advancement.[35] The states' belief that gambling can be harmful is therefore not irrational. In fact, the Court expressly so held in *Posadas*. 478 U.S. at 341.

The states may also treat lotteries in the same manner as any other form of gambling. At one time, this Court expressed the view that lotteries are beset with "inherent

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[34] Moreover, by exempting state-run lotteries from Section 1302, Congress has also allowed the states to maintain what is in effect a local monopoly over lawful lottery activity as a means of raising state revenues.

[35] See, *e.g.*, the Congressional Statement of Findings and Purpose preceding the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-923, 18 U.S.C. 1961 note; S. Rep. 91-617, 91st Cong., 1st Sess. 71 (1969); President Nixon's Message on Organized Crime, H.R. Doc. 91-105, 91st Cong., 1st Sess. 5-6 (1969); S. Rep. 1579, *supra*, at 1, 4; *Brown* v. *Hotel & Restaurant Employees Local 54*, 468 U.S. 491, 494-495 (1984); *Phalen* v. *Virginia*, 49 U.S. (8 How.) at 168; President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 2 (1967); President's Commission on Organized Crime, *Interim Report to the President and the Attorney General—The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 51 (1984); *Gambling* 74-88, 680-734; G. Sullivan, *supra*, at 45-49, 120-128.

vices," and that "it cannot admit of a doubt" that they are "demoralizing in their effects, no matter how carefully regulated." *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1879). Indeed, during the last century, it was the generally accepted wisdom that "the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 167-168 (1850). See *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321, 355 (1903). More recently, it has been noted that "[p]eriodically every form of commercial gambling has been infected by corruption, attesting to the unique attraction between organized crime groups and gambling's financial promise. Horse racing, casino operations, professional sports, state run lotteries—legal gambling of all kinds has been infiltrated in some form, at some time or other, by organized crime." 7 President's Comm'n on Organized Crime, *Hearing on Organized Crime and Gambling* vi (1985). See S. Rep. 100-446, 100th Cong., 2d Sess. 25 (1988) ("bingo is certainly as much a target for criminal infiltration as any other cash gaming operation").

This Court has held that Congress has the power under the Postal Clause, Art. I, § 8, Cl. 7, to assist the states by excluding from the mails "such printed matter or merchandise as may seem objectionable to it upon the ground of public policy." *Public Clearing House* v. *Coyne*, 194 U.S. 497, 507 (1904). Moreover, because the states lack the authority to regulate what is sent through the mails,[36] Congress reasonably could have believed that

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[36] J.S. App. 12a; see *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981) (the efficient operation of the postal system requires adoption of "regulations of

federal legislation was necessary in order to prevent one state from foisting its preferences on the citizens of another.

b. Those interests are the same ones that persuaded this Court in *Ex parte Jackson* and *In re Rapier* to uphold the predecessors to Section 1302. This Court reasoned in those cases that Congress has the authority under the Postal Clause to forbid the use of the mails to promote lotteries because participating in a lottery is not a fundamental right and because Congress had not forbidden newspapers from distributing lottery-related materials by means other than the mails. The Court thus held that Congress could support the states' effort to safeguard the public against the harmful effects of gambling by excluding lottery-related promotional materials from the mails. *In re Rapier*, 143 U.S. at 134-135; *Ex parte Jackson*, 96 U.S. at 736-737.

That rationale is still valid. Participating in a lottery, like any other form of gambling, is not a constitutionally protected activity. The federal government and the states may regulate gambling, or prohibit it altogether. *Posadas*, 478 U.S. at 345.[37] Even today, most states still

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a general character having uniform applicability" throughout the country); *In re Rapier*, 143 U.S. at 134; *Ex parte Jackson*, 96 U.S. at 732.

[37] See also *Lewis* v. *United States*, 348 U.S. 419, 422-423 (1955), overruled in part on other grounds, *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Champion* v. *Ames (Lottery Case)*, 188 U.S. at 356-358; *Ah Sin* v. *Wittman*, 198 U.S. 500, 505-507 (1905). As Justice Holmes explained in *Otis* v. *Parker*, 187 U.S. 606, 609 (1903) (citations omitted):

> If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakeable infringement of rights secured by the fundamental law." * * * [W]agers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought

prohibit most forms of privately run organized gambling, such as gambling casinos, and regulate other forms of gambling, such as lotteries. Although Congress has narrowed the Act by creating an exception for state-run lotteries, 18 U.S.C. 1307,[38] that exception is not inconsistent with the overall regulatory scheme, as the district court found. J.S. App. 9a-10a. Congress could rationally believe that state-run lotteries are less likely to become large-scale gambling syndicates—latter-day versions of the Louisiana Lottery—because of state oversight and control. See G. Sullivan, *supra*, at 122-123. At the same time, the exception accommodates the interests of the states that operate lotteries themselves. That exercise in lateral federalism is a legitimate undertaking for Congress. See *South Carolina* v. *Baker*, No. 94, Orig. (Apr. 20, 1988), slip op. 5-7; *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-554 (1985).[39]

It is doubtless true that lotteries are no longer held in the same disrepute they enjoyed when this Court decided

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pardonable at least. The case would not be decided differently if lotteries had been lawful when the Fourteenth Amendment became law, as indeed they were in some civilized States.

[38] Indeed, as previously noted, Congress has recently narrowed the scope of Section 1302 even further by adopting additional exceptions for legal lotteries operated by charitable organizations or by commercial businesses in certain situations, the Charity Games Advertising Clarification Act of 1988, and for lotteries operated by Indian tribes, the Indian Gaming Regulatory Act.

[39] See S. Rep. 93-1404, 93d Cong., 2d Sess. 2 (1974) ("The purpose of * * * [Section 1307 is] to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States."); H.R. Rep. 93-1517, 93d Cong., 2d Sess. 5 (1974) ("in considering this legislation [*i.e.*, Section 1307] the committee was faced with the task of making a reasonable balance between Federal and State interests in this area. Of course, this balance includes the consideration and protection of the policies and interests of the States which do not provide for such lotteries.").

Ex parte Jackson and *In re Rapier*. Attitudes change over time, sometimes cyclicly, as new demons replace old ones. Indeed, with respect to lotteries, our attitudes may have returned to the same phase of the cycle that existed in the colonial period, when lotteries were considered an acceptable activity, or "were thought pardonable at least." *Otis v. Parker*, 187 U.S. 606, 609 (1903). Forty-five states now permit some form of gaming, such as bingo.[40] Many run state lotteries, or permit private ones to operate. The states have adopted state-run lotteries as an alternative to raising taxes and see them as a means of tapping into money that otherwise might be taken in by organized crime; private enterprises use lotteries as a means of attracting customers; and charitable organizations use lotteries as fundraising devices.[41] But the debate on the wisdom or morality of lotteries has always been undertaken in the legislatures, not the courts. It would be a mistake to conclude that today's views towards lotteries should serve as the basis for judging the constitutionality of their regulation, for today's attitudes may once again come to be seen to be as mistaken as the ones they replaced.

c. Nor is it true, as the district court suggested (J.S. App. 15a), that *Jackson* and *Rapier* have been surpassed by developments in First Amendment law. Two developments are potentially relevant here. First, the Court has made clear that, even though Congress need not operate a post office at all, the First Amendment limits Congress's power to exclude material from the mails due to its content. *Youngs Drug Products*, 463 U.S. at 69-70 n.18; *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *Lamont* v. *Post-*

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[40] S. Rep. 100-446, *supra*, at 11-12.

[41] See H.R. Rep. 100-557, 100th Cong., 2d Sess. Pt. 1, at 4 (1988); 134 Cong. Rec. S16319 (daily ed. Oct. 14, 1988); *id.* at H10445 (statement of Rep. Frank); S. Rep. 100-446, *supra*, at 2; *id.* at 33 (Additional Views of Sen. McCain); *id.* at 36 (Additional Views of Sen. Evans).

master General, 381 U.S. 301 (1965). Second, commercial speech, which formerly was thought not to implicate the First Amendment at all, *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), has since 1976 been entitled to some constitutional protection. *Virginia Pharmacy Bd., supra.* Neither development, however, has undercut *Jackson* and *Rapier.*

It is now settled law, as Justice Holmes once remarked in dissent, that "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407, 437 (1921). But it is equally well settled that Congress may exclude from the mails certain types of expression associated with injurious activities. For example, on several occasions the Court has sustained over First Amendment challenges the constitutionality of 39 U.S.C. (& Supp. IV) 3005 and 3007, which empower the Postmaster General to initiate administrative and judicial proceedings in order to intercept mailings designed to promote fraudulent schemes. *Public Clearing House* v. *Coyne, supra*; *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948); *Lynch* v. *Blount*, 505 U.S. 1007 (1972), aff'g 330 F. Supp. 689 (S.D.N.Y. 1971) (three-judge court) (§ 3005); *Outpost Development Corp.* v. *United States*, 414 U.S. 1105, aff'g 369 F. Supp. 399 (C.D. Cal. 1973) (three-judge court) (both sections). Thus, although some of the language in *Ex parte Jackson* and *In re Rapier* about the scope of the postal power would have to be qualified today, the holdings of those cases—that Congress may use its postal power to assist the states in the regulation of lotteries and other injurious schemes—remain fully valid.[42]

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[42] In fact, the Court relied on *In re Rapier* in upholding those laws. *Public Clearing House* v. *Coyne*, 194 U.S. at 508 (relying on *Rapier*); *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. at 190-191

Similarly, although the Court has in recent years extended a measure of First Amendment protection to commercial speech, the Court's decisions also demonstrate that Congress still has the power to regulate commercial speech used in the promotion of gambling activities. In particular, this Court's 1986 decision in *Posadas* upheld regulations prohibiting the commercial advertising of casino gambling to the residents of Puerto Rico, even though casino gambling and other gambling activities were legal in that jurisdiction. The Court held that Puerto Rico has a legitimate interest in restricting the commercial advertising of casino gambling in order to safeguard the moral well-being of its citizens, and to prevent the corruption and infiltration of organized crime that, unfortunately, often shadows organized gambling. 478 U.S. at 341. In addition, the Court ruled that restricting commercial advertising is a rational way to advance those interests, because the government could reasonably believe that the commercial advertising of casino gambling would enhance the demand for that activity. *Id.* at 341-342. The restriction was also reasonably tailored to Puerto Rico's interest in safeguarding the welfare of its citizens, because it was focused on residents. *Id.* at 343-344. Finally, the Court held that, since Puerto Rico could ban gambling altogether, it could take the less restrictive step of prohibiting the commercial advertising of that activity. *Id.* at 345-347. As the

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(relying on *Coyne*). That principle has also been endorsed in subsequent decisions. *E.g.*, *Friedman* v. *Rogers*, 440 U.S. 1 (1979). See also *United States Postal Service* v. *Athena Products, Ltd.*, 654 F.2d 362, 366-368 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982) (upholding 39 U.S.C. (& Supp. IV) 3005 and 3007 over a First Amendment challenge); *Original Cosmetics Products, Inc.* v. *Strachan*, 459 F. Supp. 496 (S.D.N.Y. 1978), aff'd mem., 603 F.2d 214 (2d Cir.) (Table), cert. denied, 444 U.S. 915 (1979) (§ 3005); *Hollywood House Int'l, Inc.* v. *Klassen*, 508 F.2d 1276 (9th Cir. 1974) (§ 3005); *United States Postal Service* v. *Beamish*, 466 F.2d 804, 806-807 (3d Cir. 1972) (§ 3007).

Court summarized last Term, "[i]n *Posadas* the Court concluded that 'the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.'" *Meyer* v. *Grant*, slip op. 10 (quoting *Posadas*, 478 U.S. at 345-346).

The regulatory scheme at issue here parallels the one upheld in *Posadas*. Congress has the power under the Commerce Clause, Art. I, § 8, Cl. 3, to prohibit the distribution in interstate or foreign commerce of lottery materials, such as tickets (*Champion* v. *Ames (Lottery Case)*, 188 U.S. at 356-358), or to regulate local forms of gambling that affect interstate commerce. *United States* v. *Hawes*, 529 F.2d 472, 477-478 (5th Cir. 1976) (collecting cases); *United States* v. *Hunter*, 478 F.2d 1019, 1021 (7th Cir.) (Stevens, J.), cert. denied, 414 U.S. 857 (1973) (upholding over a Commerce Clause challenge the constitutionality of 18 U.S.C. (& Supp. IV) 1955, which makes it a crime to conduct a gambling business in violation of state law). See generally *Perez* v. *United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Thus, Congress could have altogether prohibited private lotteries that are in or affect interstate commerce. Instead, Congress chose to limit the range over which private lotteries can operate by forbidding them from sending promotional materials through the mails. That judgment is lawful under *Posadas*. *Posadas* therefore shows that the Court's decisions in *Ex parte Jackson* and *In re Rapier* have not been eclipsed by the development of the commercial speech doctrine.

B. The Mailing Restrictions In Section 1302 Directly Promote Congress's Interests

The second step in the *Central Hudson* analysis is whether the advertising and prize list clauses directly advance the interests noted above. *Posadas*, 478 U.S. at

341; *Central Hudson*, 447 U.S. at 566. Section 1302 also passes that hurdle.

Posadas held that a legislature may reasonably conclude that restricting the advertising of gambling will reduce the consumer demand for that activity, and will thereby further the government's interest in protecting the public against the harms associated with gambling. 478 U.S. at 341-342. That ruling is consistent with other decisions by this Court and lower federal and state courts holding that a legislature may reasonably believe that a restriction on the advertising of alcoholic beverages will reduce the consumer demand for that product.[43] That conclusion also makes economic sense. Prohibiting the advertising of a particular product makes it more costly for consumers to learn about and purchase a good (see *Virginia Pharmacy Bd.*, 425 U.S. at 763-765;

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[43] See *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N.E.2d 138, 142 ("The advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; an advertising prohibition aids the interest in preventing that consumption."), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 749-750 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984) ("sufficient reason exists to believe that [alcohol] advertising and consumption are linked to justify the [advertising] ban, whether or not 'concrete scientific evidence' exists to that effect"); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 501 (10th Cir. 1983) ("prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems"), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A.2d 729, 734-735 (R.I. 1985); *R.I. Liquor Stores* v. *Evening Call Pub. Co.*, 497 A.2d 331, 335-337 (R.I. 1985). Cf. *Republic Entertainment, Inc.* v. *Clark County Liquor & Gaming Licensing Bd.*, 99 Nev. 811, 672 P.2d 634 (1983) (upholding local regulations prohibiting unlicensed escort services from advertising); *Princess Sea Indus., Inc.* v. *State*, 97 Nev. 534, 635 P.2d 281 (1981), cert. denied, 456 U.S. 926 (1982) (upholding state statute prohibiting licensed brothels from advertising).

Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 26-28 (1979)) and therefore complements a restriction on its distribution. It was not irrational, therefore, for Congress to conclude that barring lotteries from sending promotional materials through the mails will limit participation in lotteries, and that the advertising and prize list restrictions will complement the prohibitions in Sections 1301 and 1302 on the use of instrumentalities of interstate and foreign commerce or the mails to distribute lottery tickets. That reasonable belief, *Posadas* held, is all the First Amendment demands. 478 U.S. at 342 (the direct advancement step is met where the legislative judgment is "a reasonable one"). See *Metromedia*, 453 U.S. at 508-509 (plurality opinion) ("direct advancement" step met where the legislative judgment "is not manifestly unreasonable"; accepting "the accumulated, common sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety"); *Central Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for [the product].").

C. The Mailing Restrictions In Section 1302 Are No More Extensive Than Necessary

The last step in the *Central Hudson* analysis is whether the restriction is no more extensive than necessary to serve the government's interest. *Posadas*, 478 U.S. at 343; *Central Hudson*, 447 U.S. at 566. Section 1302 also passes that test.

1. Section 1302 does not forbid publications, including newspapers, from publishing news stories or commentary about lotteries. In fact, it does not even prohibit publications from publishing lottery advertisements or lists of prizes they award. It simply forbids them from using the mails if they choose to promote lotteries. Thus, Section 1302 does not interfere with a newspaper's ability to inform the public about newsworthy events, nor does it intrude into the editorial process in any material way.

The act affects only a newspaper's decision whether to publish lottery advertisements and prize lists, and that does not materially interfere with a newspaper's editorial judgment. See *Pittsburgh Press*, 413 U.S. at 387 ("this kind of editorial judgment does not necessarily strip commercial advertising of its commercial character"); *id.* at 387 n.11 (citing *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970), which upheld the related broadcast advertising ban in 18 U.S.C. 1304). Accordingly, Congress has gone no further than necessary to accomplish its goals. See *Posadas*, 478 U.S. at 343-344; *Metromedia*, 453 U.S. at 508 (plurality opinion).

2. Appellee contends (87-1943 J.S. 13-15) that Section 1302 is overbroad because it is not limited to large-scale interstate gambling enterprises and applies to lotteries operated on a local basis and to newspapers with only a minimal interstate circulation. Appellee, however, has misinterpreted the last part of the *Central Hudson* test. That element is designed to ensure that the regulation of commercial speech does not also restrict other expression, such as political speech, which is entitled to greater immunity than commercial speech. See *Posadas*, 478 U.S. at 343-344. It does not demand that Congress limit the restriction on commercial speech to only those commercial transactions that pose the risks that Congress fears. As a general rule, "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented [Congress] may do so." *Westfall* v. *United States*, 274 U.S. 256, 259 (1927). In any event, even if locally run lotteries do not today pose the same risks as large-scale interstate organized gambling, Congress may reasonably conclude that reducing the commercial promotion of gambling by all lotteries is a valuable way to prevent some of them from growing into large-scale gambling enterprises.

3. Amicus Minnesota Civil Liberties Union argues that there should be a special exception for newspapers from

Section 1302, since the Act, it claims, has a "disproportionate and unfair impact" on newspapers. MCLU Br. 18. In effect, amicus urges the Court to resurrect under the First Amendment the same exception that Congress eliminated from the law when it passed the Anti-Lottery Act of 1890 and has refused to incorporate into the act since then.[44]

This Court's decisions do not require that result. *In re Rapier* declined to create a special exemption for newspapers, and *Pittsburgh Press*, the first of the modern commercial speech cases, also refused to do so, ruling instead that a newspaper can be prohibited from publishing commercial advertisements promoting an illegal activity. 413 U.S. at 389. As the Court explained, "a commercial advertisement remains commercial in the hands of the media, at least under some circumstances," such as when a newspaper simply reprints an advertisement prepared by its sponsor. *Id.* at 387. Section 1302 imposes a similar restriction. The only difference between the advertisement in *Pittsburgh Press* and the activity that appellee's members desire to be paid to promote is that certain lotteries are not illegal in Minnesota. But that distinction should be immaterial in light of Congress' interest in helping the states that prohibit lotteries, and given the fact that the act does not interfere with the editorial process.

Creating an exception for newspapers also would undoubtedly encourage lottery sponsors to publish lottery "newspapers" rather than "circulars" in order to shelter their promotional efforts. There is even some evidence that such a practice took place before newspapers were

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[44] The issue was brought to Congress's attention as recently as 1974. See H.R. Rep. 93-1517, *supra*, at 24 (report accompanying a bill proposing the exemption for state-run lotteries now found at 18 U.S.C. 1307) (Additional Views of Rep. Froehlich).

added to the law by the Anti-Lottery Act of 1890.[45] An exception for newspapers would therefore swallow the rule.[46]

To be sure, Section 1302 adds to a newspaper's publication costs if it wishes to use the mails. A newspaper must either run a separate edition without lottery advertising or prize lists in order to send its papers in the mails, or it must print circulars that are inserted into its street editions, or it must forgo the revenues from lottery promotions. See G. Sullivan, *supra*, at 106-107 (describing the practice of "replating" different editions in New York following the adoption of a state-run lottery). But history shows that Section 1302 has not driven newspapers out of business or cheapened the public dialogue. Representative Wilkinson's prediction during the debate on the Anti-Lottery Act of 1890 (page

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[45] A report from the Postmaster General to the Speaker of the House of Representatives described two such "newspapers." *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. 22, *supra*, at 12.

[46] Of course, the courts could attempt to limit the exception to "bona fide" newspapers. That solution, however, poses significant definitional problems. Unless any publication that remotely resembles a newspaper could invoke the exception, the courts would need to distinguish bona fide newspapers from ones that exist simply to evade the law. Doing so would require the courts to pursue an undirected line-drawing exercise, because neither the text nor purposes of the First Amendment supply any assistance in making that determination. See *Regan* v. *Time, Inc.*, 468 U.S. 641, 683 n.22 (1984) (citation omitted) ("There is * * * much truth in the District Court's observation that '[t]he definition of a journal, newspaper or album is anyone's game to play.' ") (opinion of Brennan, J.); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring); *Branzburg* v. *Hayes*, 408 U.S. 665, 703-705 & n.40 (1972). It is also far from clear why the First Amendment should encourage discrimination of this type, because "the traditional doctrine [is] that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as the large metropolitan publisher who uses the latest photocomposition methods." *Id.* at 704; *Lovell* v. *City of Griffin*, 303 U.S. 444, 450, 452 (1938).

26 note 29, *supra*) has proved correct: Limiting the ability of newspapers to carry commercial lottery advertisements and prize lists has not become a vehicle for censorship of the press. To paraphrase the court's aphorism in *Walz* v. *Tax Commission*, 397 U.S. 664, 678 (1970), if a restriction on the commercial promotion of lotteries is the first step towards censorship of the press, the second step has been long in coming.

CONCLUSION

In No. 87-1943, the judgment of the district court upholding the advertisement clause in 18 U.S.C. 1302 should be affirmed. In No. 87-1956, the judgment of the district court invalidating the prize list clause in 18 U.S.C. 1302 should be reversed.

Respectfully submitted.

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NOVEMBER 1988

APPENDIX A

1. Article I, § 8, Cl. 7 of the Constitution of the United States provides in relevant part as follows:

> The Congress shall have Power * * * To establish Post Offices and Post Roads.

2. The First Amendment to the Constitution of the United States provides in relevant part as follows:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

3. 18 U.S.C. 1301 provides as follows:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift[] enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

4. 18 U.S.C. 1302 provides as follows:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title—

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

5. 18 U.S.C. 1303 provides as follows:

Whoever, being an officer or employee of the Postal Service, acts as agent for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme,

shall be fined not more than $100 or imprisoned not more than one year, or both.

6. 18 U.S.C. 1304 provides as follows:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

7. 18 U.S.C. 1307 provides as follows:

> (a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—
>
> > (1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or
> >
> > (2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.
>
> (b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—
>
> > (1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests.

8. 39 U.S.C. 3001 provides in relevant part as follows:

(a) Matter the deposit of which in the mails is punishable under Section 1302 * * * of title 18 * * * is nonmailable.

9. 39 U.S.C. (& Supp. IV) 3005 provides in relevant part as follows:

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, including the mailing of matter which is nonmailable under section 3001(d) of this title, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of

any kind, the Postal Service may issue an order which—

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender;

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note; and

(3) requires the person or his representative to cease and desist from engaging in any such scheme, device, lottery, or gift enterprise.

For purposes of the preceding sentence, the mailing of matter which is nonmailable under section 3001(d) by any person shall constitute prima facie evidence that such person is engaged in conducting a scheme or device for obtaining money or property through the mail by false representations.

(b) The public advertisement by a person engaged in activities covered by subsection (a) of this section, that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency in any other legal way satisfactory to it.

(c) As used in this section and section 3006 of this title, the term "representative" includes an agent

or representative acting as an individual or as a firm, bank, corporation, or association of any kind.

(d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery, (2) tickets or other materials concerning such a lottery within that State to addresses within that State, or (3) an advertisement promoting the sale of a book or other publication, or a solicitation to purchase, or a purchase order for any such publication, if (A) such advertisement, solicitation, or purchase order is not materially false or misleading in its description of the publication; (B) such advertisement, solicitation, or purchase order contains no material misrepresentation of fact: * * * Paragraph (3) shall not be applicable to any publication, advertisement, solicitation, or purchase order which is used to sell some other product in which the publisher or author has a financial interest as part of a commercial scheme. * * *

10. The Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625 (Nov. 7, 1988), provides as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Charity Games Advertising Clarification Act of 1988".

SEC. 2. AMENDMENTS RELATING TO THE MAILING AND BROADCAST OF ADVERTISEMENTS FOR LEGAL LOTTERIES AND SIMILAR ENTERPRISES.

(a) STATE-CONDUCTED LOTTERIES UNDER TITLE 18.—Subsection (a) of section 1807 of title

18, United States Code, is amended to read as follows:

"(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to—

"(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is—

"(A) contained in a publication published in that State or in a State which conducts such a lottery; or

"(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

"(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

"(A) conducted by a not-for-profit organization or a governmental organization; or

"(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization."

(b) DEFINITION OF NOT-FOR-PROFIT ORGANIZATION.—Subsection (d) of section 1307 of title 18, United States Code, is amended by adding at the end thereof "For purposes of this section, the term a 'not-for-profit organization' means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.".

(c) POSTAL SERVICE REGULATION OF LOTTERIES.—Paragraph (1) of section 3005(d) of title 39, United States Code, is amended to read as follows: "(1) publications containing advertisements, lists of prizes, or information concerning a lottery, which are exempt, pursuant to section 1307 of title 18 of the United States Code, from the provisions of sections 1301, 1302, 1303, and 1304 of title 18 of the United States Code,".

SEC. 3. TECHNICAL AMENDMENTS.

(a) AMENDMENTS TO TITLE 18, UNITED STATES CODE.—Chapter 61 of title 18, United States Code, is amended as follows:

(1) The section heading of section 1307 is amended to read as follows:

"§ 1307. Exceptions relating to certain advertisements and other information and to State-conducted lotteries".

(2) The item relating to section 1307 in the table of sections at the beginning of chapter 61 is amended to read as follows:

"Sec. 1307. Exceptions relating to certain advertisements and other information and to State-conducted lotteries.".

(3) Subsection (d) of section 1307 is amended by inserting after "purposes of" the following: "subsection (b) of".

(4) The first sentence of section 1304 is amended by inserting after "radio" the following: "or television."

SEC. 4. SEVERABILITY.

If any provision of this Act or the amendments made by this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act and the amendments

made by this Act, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall take effect 18 months after the date of the enactment of this Act.

11. Section 21 of the Indian Gaming Regulatory Act, Pub. L. No. 100-497 (Oct. 17, 1988), provides as follows:

Consistent with the requirements of this Act, sections 1301, 1302, 1303 and 1304 of title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to this Act.

12. Section 123.42 of the *Domestic Mail Manual* (1988) provides as follows:

.42 Lottery Matter (18 U.S.C. 1302)

.421 Any scheme or promotion, whether or not lawful under the laws of any state, which, upon payment of consideration, offers a prize dependent in whole or in part upon lot or chance, is a lottery.

.422 The following matter is unlawful mail matter:

a. Any letter, package, postal card, or circular which advertises, invites or otherwise permits or facilitates participation in a lottery.

b. Any lottery ticket or part thereof or substitute.

c. Any form of payment for a lottery ticket or share.

d. Any newspaper, circular, pamphlet, or publication of any kind containing any advertising of a lottery or similar enterprise, or any list of prizes awarded in such an enterprise.

.423 This section does not apply to any fishing contest not conducted for profit, wherein prizes are awarded for the species, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event (18 U.S.C. 1305).

.424 This section does not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a state acting under the authority of its law contained in a newspaper published in that state or in an adjacent state which conducts such a lottery, or to the mailing to addresses within a state of tickets or other material concerning a lottery conducted by that state under the authority of its law (18 U.S.C. 1307).

APPENDIX B

The following item is reproduced from *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. 22, 46th Cong., 2d Sess. 35-36 (1880):

LA. S.L.

UNPRECEDENTED ATTRACTION—OVER HALF A MILLION DISTRIBUTED—LOUISIANA STATE LOTTERY COMPANY.

This institution was regularly incorporated by the legislature of the State for educational and charitable purposes in 1868, for the term of twenty-five years, to which contract the inviolable faith of the State is pledged, with a capital of $1,000,000, to which it has since added a reserve fund of $350,000. Its grand single number drawings will take place monthly. It never scales or postpones. Look at the following distribution:

GRAND PROMENADE CONCERT.

During which will take place the 115th grand monthly and the extraordinary semi-annual drawing at New Orleans, Tuesday, December 16, 1879, under the personal supervision and management of Gen. G. T. Beauregard, of Louisiana, and Gen. Jubal A. Early, of Virginia. [*]

Capital prize, $100,000.

NOTICE.—Tickets are ten dollars only; halves, $5; fifths, $2; tenths, $1.

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* Famous confederate generals Beauregard and Early were hired by the Louisiana Lottery "[t]o inspire the public with confidence" (H. Asbury, *supra*, at 86) and "to give the proceedings an air of respectability and honesty." G. Sullivan, *supra*, at 54.

LIST OF PRIZES.

1	capital prize of $100,000	$100,000
1	grand prize of $50,000	50,000
1	grand prize of $20,000	20,000
2	large prizes of $10,000	20,000
4	large prizes of $5,000	20,000
20	prizes of $1,000	20,000
50	prizes of $500	25,000
100	prizes of $300	30,000
200	prizes of $200	40,000
600	prizes of $100	60,000
10,000	prizes of $10	100,000

APPROXIMATION PRIZES.

100	approximation prizes of $200	20,000
100	approximation prizes of $100	10,000
100	approximation prizes of $75	7,500
11,279	prizes, amounting to	522,500

Gen. G. T. Beauregard, of Louisiana, Gen. Jubal A. Early, of Virginia, Commissioners.

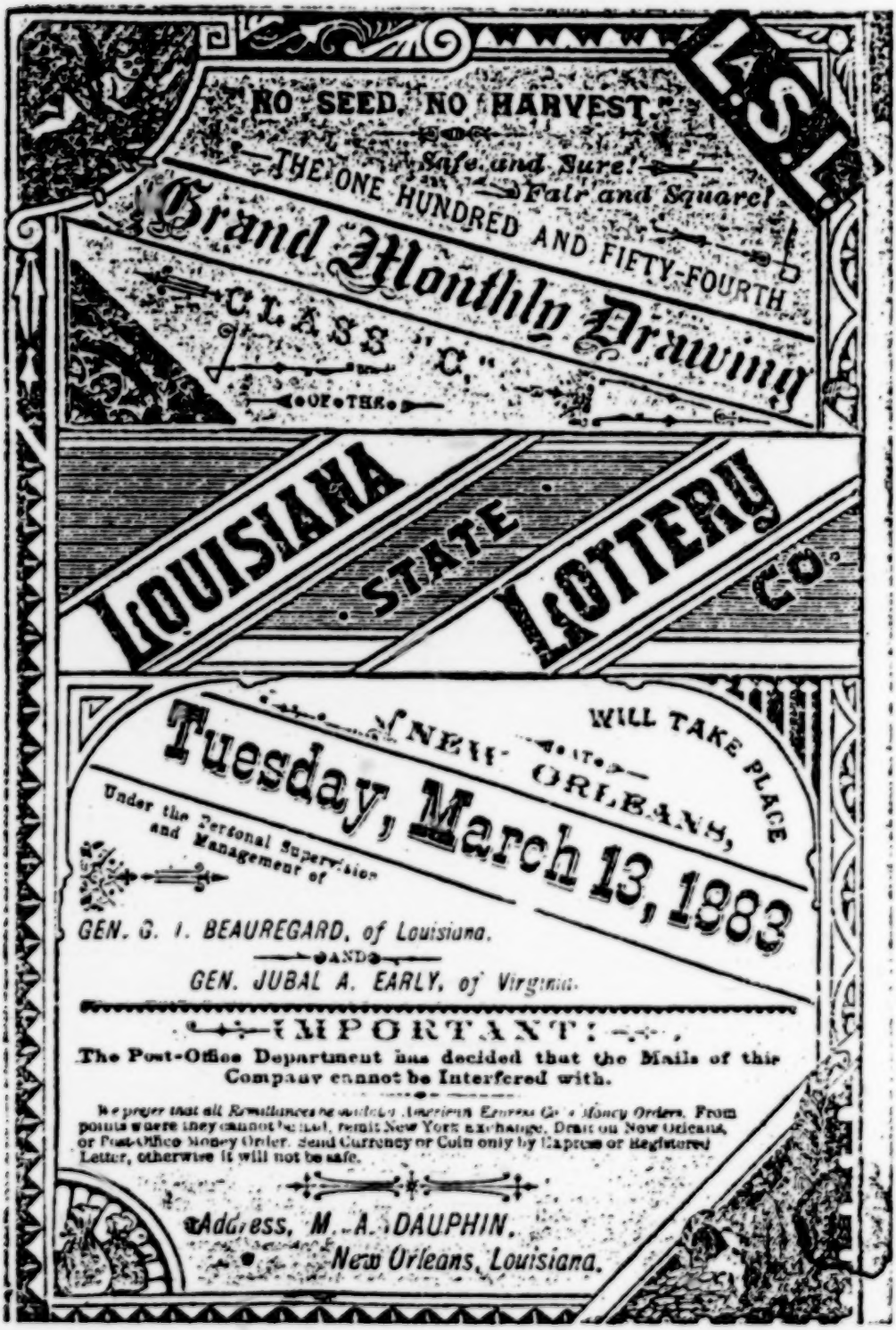
Applications for rates to clubs should only be made to the office of the company in New Orleans.

Write for circulars, or send orders to

M.A. DAUPHIN,
P.O. Box 692, New Orleans, La.

Or same person at No. 319 Broadway, New York

The following items are reproduced from G. Sullivan, *By Chance a Winner: The History of Lotteries* 53, 55 (1972):



HAVANA SCHEME.

Shelby College Lottery of the State of Kentucky.

HAMMETT & CO., United States Licensed Lottery Agents.

CLASS 238,

To be drawn in Covington, Ky., on Wednesday, May 31st, 1865.

Capital Prizes $40,000, $20,000, &c., amt'g to $318,750.

Brilliant Lottery on the Royal Havana Plan of Single No.'s.

SCHEME.

1	Prize of	$40.000	is	$40.000
1	Prize of	20.000	is	20.000
1	Prize of	10.000	are	20.000
1	Prize of	10.000		
1	Prize of	7.375	are	14.750
1	Prize of	7.375		
1	Prize of	5.000	are	20.000
1	Prize of	5.000		
1	Prize of	5.000		
1	Prize of	5.000		
4	Prizes of	3.000	are	12.000
11	Prizes of	2.000	are	22.000
25	Prizes of	1.000	are	25.000
50	Prizes of	500	are	25.000
100	Prizes of	200	are	20.000
5.000	Prizes of	20	are	100.000
5.200	Prizes	amounting to		$318.750

PLAN OF THE LOTTERY.—The numbers from 1 to 5200, corresponding with the numbers on the tickets, printed on separate slips of paper, are rolled up and numbered with small brass tubes, and placed in a Glass Wheel. The numbers of the different 200 full Prizes similarly printed and enumbered, are placed in another wheel. The number and prize drawn out are opened and exhibited to the audience, and registered by the Commissioners, the prize being placed against the number drawn. This operation is repeated until all the prizes are drawn out.

The 5000 prizes of $10 each are determined by the last figure of the number which draws the highest Capital Prize, ($40,000.) For example:—If the number drawing the $40,000 prize ends with figure 1, then those 5000 tickets having numbers ending in figure 1 will be entitled to $10. If the number ends with figure 7, then those tickets where the number ends in figure 3 will be entitled to $10, and so on to figure 0.

PACKAGES TEN DOLLARS.

Prizes payable in full without deduction.

☞ Remittances to Hammett & Co. can be made by mail with perfect safety; but if any person desires additional security, they can send a draft duly indorsed, (some where will be required) payable to our order—or have their letters registered, when it will be equivalent to a positive and safe delivery to us. ☞ Prizes of all registered Letters promptly secured, and information given by telegraph.

HAMMETT & CO., Box 2100, P. O., New York City.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 241699 80760

SUPREME COURT, U.S.
FILED
DEC 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1943 and 87-1956

In the

Supreme Court of the United States

October Term, 1988

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO DISMISS APPEAL

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v.

ANTHONY M. FRANK,
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POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO DISMISS APPEAL

The Minnesota Newspaper Association, Inc. (MNA), Appellant in No. 87-1943, and Appellee in No. 87-1956, moves that the cause in No. 87-1956 be dismissed, or in the alternative that it be vacated and remanded, because it appears that the cause is now moot, fails to present a substantial question, and lacks a sufficient record. The basis for this motion is described below.

MNA has, by a separate request directed to the Clerk pursuant to Rule 53, asked that its appeal in No. 87-1943 be dismissed as well.

Both No. 87-1943 and No. 87-1956 arise out of the same decision of the District Court below. The question presented to the District Court was whether certain federal statutes relating mainly to the United States Postal Service violate the First Amendment when applied to prohibit the dissemination of advertising about gaming that is legal under state law.

The District Court ruled that the challenged statutes were for the most part constitutional. It did however hold that the portion of 18 U.S.C., § 1302 which prohibits the mailing of lists of prizes awarded from a lottery was unconstitutional. No. 87-1956 is an appeal by the federal parties from that part of the lower court's decision.

Since the date on which No. 87-1956 was docketed, Public Laws No. 100-625 and 100-497 have been signed into law. The new legislation would appear to have a major impact on the issues presented in this appeal.

Public Law No. 100-625, titled "Charity Games Advertising Clarification Act," has essentially eliminated the application of the challenged statutes to gaming conducted by local charitable organizations. Public Law No. 100-497, titled "Indian Gaming Regulatory Act," has done the same with respect to games operated by Indian tribes on reservation land. Among other provisions, the new legislation removes the restrictions that prevented the mailing of prize lists with respect to the just described categories of games.

MNA's purpose in bringing this action below was almost solely based on its concerns about the prohibitive effect of Section 1302 and related provisions on advertising in Minnesota newspapers by charitable organizations and Indian tribes. Those concerns have been entirely resolved by the new legislation.

Furthermore, there was a very limited factual record developed below. The only factual submission of any kind in the Court's file was a five page overview of gaming practices in Minnesota and the United States, which was attached as an appendix to MNA's Memorandum of Law in support of its motion for summary judgment. The District Court accepted this over the objections of the federal parties, and the factual content of the appendix was never subjected to the scrutiny imposed by the rules of evidence, since the Court below decided the case on cross motions for summary judgment.

That appendix focuses mainly on charitable gaming. It contains no mention of prize lists. Therefore, no portion of the record below in any fashion refers to the character, use, or possible effect of prize lists disseminated by lotteries. As a result, any discussion of issues involving prize lists in this appeal must be purely a matter of theory and speculation.

The federal parties in effect acknowledge this where in note 19 of their Brief to this Court, they endeavor to describe the reasons why the new legislation does not render their case moot. They claim that there remain situations not reached by the new legislation which would be affected by the District Court's decision.

The situations listed in note 19 are (a) enforcement against use of lists of prize winners by "an illegal numbers racket," (b) "commercial lotteries, such as casinos," and (c) "state-run lotteries" publishing lists in a state that does not conduct such a lottery. While these contingencies may be imagined, there is no evidence whatsoever in the record indicating that such enterprises have ever actually disseminated prize lists by use of the mails, much less any evidence describing the possible purpose, nature, or impact of such dissemination.

The federal parties have in effect created a purely hypothetical case, which involves only improbable and remote contingencies. MNA has little interest in the resolution of the issues that might surround those situations. In no meaningful degree do they appear to affect MNA or its members.

Article III of the Constitution requires that the exercise of judicial power depends on the existence of an actual case or controversy. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). But the passage of the above-described legislation has largely eliminated any case or controversy in this matter. The government's assertions in the particular factual context of this case are really much ado about nothing.

The Court has also repeatedly noted the importance of an adequately developed record with respect to the specific issues on appeal. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. _____, 108 S.Ct. 1645, 1651 (1988). Adherence to such "customary limitations on our discretion" are particularly appropriate where difficult issues of "great public importance are involved." *Id.* Certainly the interpretation and application of the First Amendment

qualifies under this standard, and the Court has recently declined to express detailed views on the proper resolution of First Amendment questions without a thoroughly developed record. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

Additionally, the Court has observed that the degree to which a decision would affect the rights of the immediate parties is also material to the question of mootness. *U.S. Dept. of Justice v. Provenzano*, 469 U.S. 14, 15 (1984).

Consistent with the foregoing considerations, this Court previously remanded a case arising under the same statutory framework for determination as to its mootness, when during the pendency of the appeal Congress amended portions of the law dealing with state-run lotteries. *United States v. New Jersey State Lottery Commission*, 420 U.S. 371 (1975).

If those situations cited at note 19 in the federal parties' Brief really do have some potential to cause problems under the remnants of the regulatory scheme that is at issue here, even after the enactment of the new legislation, then actual cases will certainly appear in which the legal and factual record will be adequately focused. The government may then proceed against the parties that are directly involved in violations, and the issues at stake will presumably be thoroughly developed. The District Court's decision below on prize lists would be fully subject to appellate review at that time. The government therefore risks or loses nothing if the motion herein is granted.

In sum, the legislative developments described above make this case entirely inadequate as a vehicle for resolving issues that could have broad significance. It is therefore respectfully submitted that cause No. 87-1956 should be dismissed, or at minimum, vacated and remanded to the District Court for further proceedings.

Respectfully submitted,

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Nos. 87-1943 and 87-1956

In the Supreme Court of the United States

OCTOBER TERM, 1988

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MEMORANDUM FOR THE FEDERAL PARTIES IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1943

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

No. 87-1956

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MEMORANDUM FOR THE FEDERAL PARTIES IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

Appellee Minnesota Newspaper Association, Inc., has moved to dismiss the appeal taken by the government in No. 87-1956, or to vacate the judgment below, on three grounds.[1] None has merit.

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[1] Appellee has also stated that it will move to dismiss its own appeal in No. 87-1943. Under this Court's Rule 53.2, appellee is of course free to move to dismiss its own appeal for any reason. Any such motion, however, will have no effect on this one.

1. After the Court noted probable jurisdiction over our appeal in No. 87-1956, Congress enacted two new laws, the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625 (Nov. 7, 1988) (the Advertising Act), and the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (the Indian Gaming Act). Contrary to appellee's contention, the recent passage of these laws has not rendered our appeal moot.

The Advertising Act adds to 18 U.S.C. 1307 certain additional exemptions from 18 U.S.C. 1302 for legal lotteries conducted by a charitable or governmental organization or by a commercial enterprise as an occasional and ancillary promotional activity. The Indian Gaming Act creates a new National Indian Gaming Commission within the Department of the Interior to regulate and supervise commercial gaming activities conducted or authorized by Indian tribes on Indian lands under ordinances adopted by the governing body of an Indian tribe and approved by the Commission Chairman. §§ 5, 7, 102 Stat. 2469-2471. Section 21 of that Act, 102 Stat. 2486, also exempts from Section 1302 "any gaming conducted by an Indian tribe pursuant to this Act."[2]

As as we noted in our opening brief (at 9), Section 5 of the Advertising Act expressly provides that the new exemptions added by that law do not take effect until 18 months after the date of their enactment, *i.e.*, until May 7, 1990.[3] Thus, appellee's member newspapers may not at

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[2] Section 21 of the Indian Gaming Act is reprinted in our opening brief (at 9a).

[3] The Act is reprinted in its entirety in the appendix to our opening brief (at 6a-9a). Section 5 provides that (*id.* at 9a): "The amendments made by this Act shall take effect 18 months after the date of the enactment of this Act." President Reagan signed the Act into law on November 7, 1988.

As we also explained in our opening brief (at 9), Congress postponed the effective date of that Act in order to give the states the op-

this time avail themselves of the additional exemptions to the prohibitions of the prize list clause of Section 1302 added by the Advertising Act. Moreover, this case would not be moot even if that law took effect immediately. The Advertising Act applies only to legal lotteries conducted by a charitable or governmental organization, or by a business as an occasional and ancillary promotional activity. It does not apply to professional gambling enterprises, such as casinos. Similarly, the Indian Gaming Act exemption applies only to authorized tribal gaming activities. Any Indian gaming activities not conducted in compliance with that Act are still subject to Section 1302. By contrast, the judgment below is not so limited. The court held the prize list clause in Section 1302 facially unconstitutional and enjoined the federal parties from enforcing that provision against any party, including the operators of an illegal numbers racket. Finally, neither Act modifies the text or meaning of the prize list clause; they simply added new exemptions to it. Accordingly, those Acts do not affect the question presented in our appeal in No. 87-1956, which involves the proper interpretation and facial constitutionality of the prize list clause.

Contrary to appellee (Mot. to Dis. 4), *United States* v. *New Jersey State Lottery Comm'n*, 420 U.S. 371 (1975), does not support the proposition that this case is moot. There, Congress adopted legislation after the court of ap-

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portunity to decide whether, in light of the new amendments, to prohibit lotteries altogether, or to forbid them from advertising. Accordingly, whether and how newspapers will be able to take advantage of the new exemptions is contingent on how various state legislatures (including Minnesota's) respond to Congress's invitation to reconsider their laws. That response is uncertain at present. If a state decides to prohibit lotteries, the district court's judgment would prevent the government from enforcing the prize list clause of Section 1302 against those illegal games.

peals' decision that immediately supplied the aggrieved party, a radio station seeking to broadcast winning lottery numbers in a lawful state-run lottery, with complete relief for its asserted injury. By contrast, in this case it is clear that the new legislation does not immediately supply appellee with the relief it sought. Moreover, the relief sought by appellee is broader than that afforded by the new legislation.[4] In sum, the controversy between the parties about the meaning and constitutionality of the prize list clause is still ongoing. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 426-427 n.3 (1987).[5]

2. Appellee also suggests that, in light of the two Acts discussed above, the question presented in our appeal no longer merits plenary review. Appellee, however, has overlooked the fact that this case is an appeal from a judgment by a district court holding unconstitutional an act of Congress and therefore comes within this Court's appellate

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[4] In its complaint, appellee sought a declaratory judgment that Section 1302 and 39 U.S.C. (& Supp. IV) 3001 and 3005 are unconstitutional as applied to its member newspapers "to the extent they prohibit or interfere with the publication of information about lawful gaming activities, regardless of the form." J.A. 8. In our opening brief (at 9 n.19), we gave examples of how the prize list clause would still be applicable to the publication of prize lists for lawful lotteries in appellee's member newspapers even after the Advertising Act goes into effect. Appellee concedes that the prize list clause will still apply to newspapers in those circumstances. Mot. to Dis. 3.

[5] For the reasons explained in the text, since the new laws do not modify the prize list clause in Section 1302, there is no reason for the district court to reconsider its interpretation of that clause. Accordingly, the legislation supplies no basis for vacating the district court's judgment and remanding the case to that court for it to reconsider its decision in light of the new legislation.

jurisdiction under 28 U.S.C. 1252. Accordingly, "[this Court] ha[s] no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under [this Court's] certiorari jurisdiction." *Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975). This Court cannot summarily dispose of our appeal without resolving the merits of our submission.[6]

As we explained in detail in our opening brief, the court below held the prize list clause unconstitutional on the basis of a misinterpretation of its scope. When properly construed, the prize list clause in Section 1302 is a valid regulation of commercial speech promoting a lottery. Nothing in either Act cited by appellee remotely suggests that the court below properly construed the prize list clause, and appellee makes no such claim. Accordingly, neither Act supplies any basis for summarily affirming the judgment below on the ground that the question presented by our appeal is so insubstantial as to eliminate any need for further argument in this Court. Sup. Ct. R. 16.1(c).

3. Finally, appellee suggests that the judgment below should be vacated and the case remanded to the district court for development of a more complete factual record. That suggestion is not properly before the Court at this time, because it is not based on the new legislation and because it goes to the merits of the appeal. Appellee's suggestion therefore should be presented in its brief on the merits. See Sup. Ct. R. 16.7; *Kadrmas* v. *Dickinson Public Schools,* No. 86-7113 (Jan. 11, 1988) (order denying ap-

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[6] Although appellee has captioned its pleading as a motion to dismiss the appeal in No. 87-1956, the appeal in this case was taken from the judgment of a federal district court, not a state court. Sup. Ct. R. 16.1(c); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 419 (6th ed. 1986). Appellee's motion should have been styled as, and must be treated as, a motion to affirm.

pellee's motion to dismiss the appeal on estoppel and mootness grounds); *Kadrmas* v. *Dickinson Public Schools*, No. 86-7113 (June 24, 1988), slip op. 4-6 (rejecting appellee's claims in the decision on the merits of the appeal).

In any event, appellee's suggestion is meritless. The two questions before the district court were legal, not factual. The first involved the meaning of the prize list clause, which is a straightforward question of statutory construction. The second concerned the facial constitutionality of the prize list clause, as thus construed. An elaborate factual record is unnecessary to answer that issue, because the question whether a legislative restriction on commercial speech is constitutional does not ordinarily turn on questions of historic fact.[7]

Finally, appellee has overlooked the procedural posture of this case in district court. Appellee did not oppose the government's motion for summary judgment on the ground that material facts were in dispute. Fed. R. Civ. P. 56(e). On the contrary, appellee sought and received summary judgment on the basis of the affidavits and exhibits

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[7] See *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 340-344 (1986) (upholding a restriction on gambling advertising in part because the legislature could reasonably have believed that it was necessary to safeguard the public welfare and would directly advance that interest); *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 508-509 (1981) (plurality opinion) (upholding a restriction on commercial billboard advertising by relying on the "common-sense judgments" of legislators and lower courts); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 748-749 n.8 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984) (whether a restriction on commercial speech is constitutional is not a question of fact under Fed. R. Civ. P. 52(a)); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 500-501 (10th Cir. 1983) (whether the direct advancement step of *Central Hudson* is met is not a question of fact), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

that it submitted along with its motion. J.A. 1, 14-24. Appellee may not now claim that additional factual development is necessary before this Court can decide whether the district court properly granted its own summary judgment motion.[8]

It is therefore respectfully submitted that the motion to dismiss should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1988

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[8] Appellee therefore errs in relying (Mot. to Dis. 4) on *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986). There, the district court dismissed the plaintiff's complaint for failure to state a claim, but the court of appeals reversed. This Court upheld the court of appeals' judgment on the ground that "[t]he City has adduced essentially factual arguments to justify the restrictions on cable franchising imposed by its ordinance, but the factual assertions of the City are disputed at least in part by the [cable company]." 476 U.S. at 494. In this case, by contrast, the government has not sought to defend the constitutionality of Section 1302 on the basis of disputed historic facts. In any event, it was appellee who asked for and received summary judgment in district court. If the factual record is insufficient, appellee has only itself to blame.

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No. 87-1988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.,
Appellee.

On Appeal from the United States District Court for the District of Minnesota

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QUESTIONS PRESENTED

1. Whether this case is moot for the reason that Appellee has no interest in the only issue presented by this appeal, given the government's construction of the statute.

2. Whether, even if this case is not moot, prudential considerations should bar this Court from deciding the abstract issue presented by this appeal, in the absence of any factual record concerning that issue.

3. Whether 18 U.S.C. § 1302 may constitutionally be applied to prohibit the mailing of prize lists appearing in commercial speech other than advertising.

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IN THE

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OCTOBER TERM, 1988

No. 87-1956

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.,
Appellee.

On Appeal from the United States District Court for the District of Minnesota

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee, Minnesota Newspaper Association, Inc.,[1] is an association of all the general interest, and many of the special interest, newspapers published in Minnesota. J.A. 3.

Minnesota permits nonprofit organizations to conduct lotteries and other games of chance, subject to regulation by the Minnesota Charitable Gaming Board. *See*

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[1] Minnesota Newspaper Association, Inc. has no parent, subsidiary, or affiliate corporations. (Supreme Court Rule 28.1.)

Minn. Stat. Ann. Ch. 349 (West Supp. 1989) and § 609.761 (West 1987). All other lotteries and gambling are prohibited. Minn. Stat. Ann. §§ 609.75-.762 (West 1987 & Supp. 1989). In addition, various Indian tribes lawfully conduct lotteries and other games of chance in Minnesota. J.A. 4.

The member newspaper of MNA wish to publish news coverage of and advertisements for these legal gambling activities. However, 18 U.S.C. § 1302 and 39 U.S.C. §§ 3001 and 3005 prohibited the mailing of newspapers containing advertisements for or prize lists of a lottery, gift enterprise, or other scheme offering prizes dependent upon chance. Because many of MNA's members rely heavily upon the United States Mail to distribute their newspapers, J.A. 4, 14-15, these statutes forced MNA's members to reject both advertising and news stories concerning these lawful games of chance. J.A. 6, 15. MNA therefore brought suit in the United States District Court for the District of Minnesota seeking a declaration that those statutes were unconstitutional as applied to MNA's member newspapers to the extent they prohibit publication of information about lawful gaming activities, and an injunction enjoining the appellants from enforcing the statutes against MNA's members to the extent they were unconstitutional. J.A. 8.

On cross-motions for summary judgment, the District Court held that Section 1302's prohibition of the mailing of advertisements for lotteries was constitutional, but held unconstitutional its prohibition of the mailing of prize lists. J.S. App. (No. 87-1943) 20a. The District Court permanently enjoined the government from enforcing the prize list provisions of the statute. *Id.* The government appealed the District Court's ruling on prize lists to this Court pursuant to former Section 1252 of Title 28, U.S. Code,[2] and MNA cross-appealed under the

[2] This section was repealed by Pub. L. 100-352, § 1, 102 Stat. 662 (1988), effective September 25, 1988.

same statute for review of the District Court's ruling on the advertising provision of Section 1302.

After this Court noted probable jurisdiction of both appeals, Congress passed two laws substantially changing the issues presented by the appeals. The Charity Games Advertising Clarification Act of 1988, § 2(a), Pub. L. No. 100-625 (Nov. 7, 1988), provides that Section 1302 shall not apply to a lottery that is not prohibited by the State in which it is conducted and that is conducted by a nonprofit or governmental organization, or by a commercial organization as a promotional activity that is clearly occasional and ancillary to its primary business. The Act takes effect eighteen months after its enactment, on May 7, 1990. *Id.*, § 5. Section 21 of the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467, 2486 (1988), provides that Section 1302 shall not apply to any gaming conducted by an Indian tribe pursuant to that Act.

These two Acts have given MNA all the relief it sought in the District Court. In its suit, MNA sought only to remove prohibitions on mailing newspapers containing news stories, editorials, and advertising concerning games of chance that are lawful in Minnesota, J.A. 4, 6, and 8, and all the games of chance that are lawful in Minnesota meet the requirements of the Charity Games Advertising Clarification Act and the Indian Gaming Regulatory Act.[3] MNA and its member newspapers are content to wait for the former Act to become effective in May 1990 before publishing advertisements for non-Indian games of chance. MNA therefore has dismissed under this

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[3] The Charity Games Advertising Clarification Act, § 2(a), permits the mailing of newspapers containing advertisements and prize lists for games of chance that are lawful in the state in which they are conducted (and that meet the other requirements of the Act) regardless of whether the games of chance are also legal in the state in which the newspaper is published.

Court's Rule 53 its appeal, No. 87-1943, which challenged the constitutionality of Section 1302's prohibition on the mailing of lottery advertisements. MNA also moved to have the government's appeal dismissed as moot, but the Court denied the motion on January 9, 1988. As is shown below, MNA continues to believe this case is moot.

SUMMARY OF ARGUMENT

The appeal is moot. In view of the enactment of the Charity Games Advertising Clarification Act of 1988 and the Indian Gaming Regulatory Act and in view of the government's position on appeal that the prize list clause of Section 1302 does not apply to advertising, news stories, or editorials, MNA has no interest in the only issue remaining in this appeal—whether the prize list clause may constitutionally prohibit the mailing of prize lists contained in commercial speech other than advertising. As a result, this appeal does not present a case or controversy, and this Court has no jurisdiction to decide it.

Even if this Court does have jurisdiction, it should refrain from deciding this case because resolution of the abstract constitutional question identified by the appellants is not required by the facts presented by the parties, and the Court would have to decide that question theoretically and in the absence of a factual record.

If the Court nonetheless reaches the constitutional issue, MNA disagrees with the government's proposed test for identifying commercial speech, because it would subject to government regulation significant categories of speech fully protected by the First Amendment.

ARGUMENT

I. The Court Has No Jurisdiction to Decide This Appeal, As It Does Not Present a Case or Controversy.

MNA's member newspapers have only two interests in mailing lottery prize lists in violation of the prize list clause of Section 1302:

—mailing newspapers with news stories or editorial commentary containing such prize lists, and

—mailing newspapers with advertising containing such prize lists.

Neither of these interests is affected in any way by the prize list clause as construed by the government. The government concedes that the prize list clause does not apply to "editorials, news stories, or documentaries" about lotteries even if they identify prizes or prize winners. Br. at 30; *see also id.* at 23, 24 and 27. And because Section 1302 separately refers to advertisements, the government does not construe the prize list clause to prohibit the mailing of advertisements containing prize lists. *Id. at* 24. Therefore, in the government's view, the prize list clause prohibits only the mailing of prize lists appearing in commercial speech other than advertising. *Id.* at 23.

Given this construction of the prize list clause, MNA has no interest in the question of its constitutionality, the sole issue presented by this appeal. To be sure, MNA's interest in mailing advertisements containing prize lists is still restricted by the advertisement clause of Section 1302, but the constitutionality of that restriction was the subject of No. 87-1943, which MNA has dismissed, and not this appeal. MNA and its member newspapers are content to wait until the effective date of the Charity Games Advertising Clarification Act to mail advertisements containing prize lists for non-Indian games of chance.

MNA cannot conceive of any circumstances under which it would wish to mail prize lists appearing in commercial speech other than advertising. The government states that such speech would exist when a prize list is published by a party who has a direct financial interest in a lottery or in its promotion. Br. at 23, 29. But MNA's member newspapers have no interest themselves in sponsoring or obtaining a financial interest in a lottery [4], and the only way they could have an arguable financial interest in promoting a lottery is by publishing paid advertisements for a lottery, which, as the government construes the statute, are not covered by the prize list clause.[5]

Because MNA has no interest in the constitutionality of the prize list clause as construed by the government, it asks this Court to vacate the judgment of the District Court to the extent it applies to speech other than news stories and editorials, and to remand it to the District Court with instructions to dismiss MNA's complaint to the extent the judgment has thus been vacated.[6]

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[4] Minnesota law prohibits for-profit businesses such as MNA's member newspapers from conducting lotteries. Minn. Stat. Ann. § 609.75. Circulation promotions that do not require the payment of consideration as a precondition of participation do not constitute lotteries within the meaning of Section 1302. *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954).

[5] The government's example of a case in which a newspaper has a direct financial interest in promoting a lottery is where "a newspaper [is] paid to publish a list of lottery prizes or winning lottery numbers." Br. at 29. This is advertising pure and simple, and is no longer before the Court in this case.

[6] This will "clear[] the path for future relitigation of the issues between the parties and eliminate[] a judgment, review of which was prevented through happenstance." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950).

Given MNA's lack of interest in the only issue in this appeal, this Court has no jurisdiction to decide it. As the Court reaffirmed last term, "Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, No. 86-890 (Jan. 12, 1988), slip op. at 5 (citations omitted). Where there is no "live controversy" between the parties, the case must be dismissed. *Id.* at 6.

There is no actual, ongoing, live controversy here. MNA has no interest in the speech governed by the prize list clause as the government construes it, and therefore no personal stake in the constitutionality of the clause. "It is axiomatic that the federal courts do not decide abstract questions posed by parties who lack 'a personal stake in the outcome of the controversy.'" *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586 (1972), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). Such a personal stake is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illustration of difficult constitutional questions." *Baker v. Carr*, 369 U.S. at 204.

Because a decision on the merits can have no effect on MNA's rights, the case is moot. *Board of License Comm'rs v. Pastore*, 469 U.S. 238 (1985). Even if some situation could be imagined in which MNA might have an interest in the prize list issue before the Court,

> "[S]uch speculative contingencies afford no basis for [this Court's] passing on the substantive issues [the appellants] would have [it] decide," *Hall v. Beals*, 396 U.S. 45, 49 (1969), in the absence of "evidence that this is a prospect of 'immediacy and reality.'" *Golden v. Zwickler*, 394 U.S. 103, 109 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

DeFunis v. Odegaard, 416 U.S. 312, 320 n. 5 (1974).

Last term's decision in *Deakins v. Monaghan* shows how this appeal should be disposed of.[7] The petitioners there had brought an action in district court seeking both equitable and monetary relief. After the case was brought to this Court on certiorari, the petitioners represented to the Court that they wished to withdraw their claims for equitable relief. As a result, there was no longer a live controversy between the parties on the equitable claims, making them moot. Slip op. at 6. The Court, following *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), vacated the portion of the judgment below that addressed the equitable claims and remanded the case with instructions to dismiss those claims with prejudice. *Deakins*, slip op. at 7 & 11. MNA similarly represents to the Court that it withdraws its objection to the prize list clause to the extent it prohibits the mailing of speech other than news stories and editorials. The judgment of the District Court with respect to the prize list clause should be vacated to the extent it deals with the mailing of speech other than news stories and editorials and the case remanded to the District Court with instructions to dismiss the prize list claims to the extent the judgment has been thus vacated.[8]

II. If There Is a Case or Controversy, the Court Should Decline to Decide This Appeal for Lack of a Sufficient Factual Record.

Even if this Court, despite MNA's lack of a personal stake in the issue argued by the government, concludes that it has jurisdiction over the appeal, it should decline

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[7] In *Deakins*, as here, the Court rejected a suggestion of mootness filed before argument, but representations of counsel in response to inquiries at oral argument persuaded the Court that the suggestion of mootness was sound. *Deakins*, slip op. at 6, n.3.

[8] If the Court has any doubt as to whether there is a continuing case or controversy here, it should remand the case to the District Court for consideration of the possibility of mootness. *Sosna v. Iowa*, 419 U.S. 393, 402 n.12 (1975), citing *Indiana Employment Div. v. Burney*, 409 U.S. 540 (1973).

to decide it. To do otherwise would ignore this Court's "oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981).

The record before this Court is "extraordinarily skimpy in the sort of proved or admitted facts that would enable [it] to adjudicate" the issue presented. *Socialist Labor Party v. Gilligan*, 406 U.S. at 587. The factual record in the District Court consisted of two affidavits and a five-page summary of gaming activities and laws. J.A. 14-24. These materials provide no information on prize lists and the circumstances under which they might be mailed, nor on the mailing of prize lists in the three situations where the government claims the prize list clause may still have vitality: illegal numbers rackets, commercial lotteries, such as casinos, and state-run lotteries. Br. at 9 n.19. The record thus does not " 'tender[] the underlying constitutional issues in clean-cut and concrete form.' " *Socialist Labor Party*, 406 U.S. at 588, quoting *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1974).[9]

As the Court noted in *Rescue Army*, 331 U.S. at 570 n.34:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105. It has long been the Court's "con-

[9] The government argued in response to MNA's Motion to Dismiss the Appeal that a factual record was unnecessary because MNA challenged the facial constitutionality of the prize list clause. Opp. to Mot. to Dis. at 6. In fact, MNA challenged the prize list clause *as applied* to its members, J.A. at 8, and in any event, facts are essential even in a facial challenge to a statute's constitutionality. *Socialist Labor Party v. Gilligan*, 406 U.S. at 588.

> sidered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . . *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295.

These prudential considerations are especially compelling here. "[T]he precise bounds of the category of expression that may be termed commercial speech" may be "subject to doubt." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). The Court should not attempt the difficult task of drawing the constitutional boundaries of commercial speech in a case such as this that presents the question only in abstract form and on an undeveloped factual record.

III. The Government's Proposed Test for Commercial Speech Should Be Rejected.

Although MNA has no interest in the narrow issue presented by the government's appeal, it does have a substantial general interest in preserving First Amendment protection of both news and advertising and in resisting any attempts to expand government regulation of speech. Therefore, in the event the Court should reach the merits of this appeal, MNA will respond to the government's arguments regarding commercial speech.

A. *To Avoid Encroaching on Fully Protected Speech, Commercial Speech Should Be Clearly and Narrowly Defined.*

The government devotes most of its argument to the proposition that commercial speech is not limited to advertisements. Although MNA does not necessarily dis-

agree with this proposition as a theoretical matter, it does take sharp issue with the test the government proposes for determining whether speech is commercial speech, set forth at page 22 of its brief.[10] The government's proposed test is not supported by this Court's cases or by First Amendment theory and should be rejected.

The government's proposed test for commercial speech threatens to redefine much fully protected speech as commercial speech. Because the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980), it is essential to the continued vitality of freedom of expression that commercial speech be clearly demarcated from fully protected speech. Otherwise a speaker may refrain from engaging in fully protected speech that is close to the line dividing it from commercial speech, *id.* at 581 n.4 (Stevens, J., concurring in the judgment), thereby diminishing public discussion. As this Court has recognized on numerous occasions, freedom of expression requires breathing space. *E.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986). The Court should take great care to ensure that any definition of commercial speech is both clear and narrowly drawn, so that fully protected speech will be neither chilled nor improperly regulated.

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[10] The government proposes the following test:

> The key elements of commercial speech are (a) its subject matter, *i.e.*, whether it promotes or advances an ordinary commercial transaction; (b) the relationship between the speaker, the subject matter, and his audience, *i.e.*, whether the speaker has a direct financial interest in either the transaction or its promotion; and to a lesser degree (c) its format, *i.e.*, whether the speech appears in a form traditionally regarded as commercial advertising.

Br. at 22.

B. *Commercial Speech Either Proposes a Commercial Transaction, or Is an Integral Part of a Commercial Transaction Between the Speaker and Its Audience.*

The "core notion of commercial speech" has long been "speech which does 'no more than propose a commercial transaction.'" *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983), quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) and *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *accord*, *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979); *Central Hudson*, 447 U.S. at 562; *Zauderer*, 471 U.S. at 637; *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 9 (1986). Many advertisements do no more than propose a commercial transaction, *Pittsburgh Press*; *Zauderer*, but other speech may fit this definition as well. Justice Stevens has identified "[a] salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty" as "unquestionably fit[ting] within this concept," *Central Hudson*, 447 U.S. at 580 (Stevens, J., concurring), presumably because such speech is directly related to a proposed commercial transaction.

While commercial speech may include speech other than that *proposing* a commercial transaction, it must always be an integral part of a proposed or consummated commercial transaction between the speaker and its audience.[11] *See Friedman v. Rogers*, 440 U.S. at 10 n.9

[11] Of course, speech does not become commercial simply because it is the performance contemplated by a commercial transaction. Otherwise, "a lecture for or against Marxism, abortion, nuclear power, or racial supremacy would be commercial speech if people paid an admission charge to hear it, because the lecture would complete the transaction. Such a result would be unprecedented and untenable." *Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa*, 39 Cal. 3d 501, 511, 703 P.2d 1119, 1124, 217 Cal. Rptr. 225, 230 (1985).

("commercial speech is *linked inextricably to commercial activity*") (emphasis added).

It can certainly be argued that the prize list at issue in the case so heavily relied upon by the government, *Horner v. United States*, 143 U.S. 570 (1892), 147 U.S. 449 (1893), fits within the category of commercial speech. That case dealt with Austrian government bonds where the government determined which bonds to call for redemption at several drawings per year. An eventual payment of two hundred gulden was guaranteed for each of the bonds, but more might be paid, and paid sooner, according to the luck of the draw.[12] 143 U.S. at 571-74, n.1; 147 U.S. at 451-53, n.1. Horner was a banker, *see id.*, and while the facts are not entirely clear, it appears that he represented the Austrian government in redeeming the bonds. Assuming that Horner sent the prize list at issue to holders of the bonds, the list was an integral part of the transaction beween the bondholders and Horner's principal, the Austrian government, and was arguably commercial speech.

Restricting commercial speech to that integrally related to a transaction between the speaker and its audience is necessary to insure that fully protected speech is not subject to regulation. In *Central Hudson*, Justice Stevens criticized the majority's passing reference to commercial speech as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. This definition, he contended, at least threatens to "encompass[] speech that is entitled to the maximum protection afforded by the First Amendment," for, as he noted, "[n]either a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the

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[12] The government misidentifies the prize list in *Horner*. *See* Br. at 27 n.30. In fact, the prize list is the six-column table near the beginning of note 1 on page 572 of 143 U.S., and on page 451 of 147 U.S.

subject matter concerns only the economic interests of the audience." *Central Hudson*, 447 U.S. at 579-80 (Stevens, J., concurring). Rather, such expression should be deemed commercial speech only if it relates directly to a proposed or consummated transaction between the speaker and its audience.

C. *The Government's Proposed Test for Commercial Speech Threatens to Remove It From Its Anchor in Commercial Transactions.*

1. "Promotes or Advances".

The test for commercial speech that the government proposes in its brief threatens to remove commercial speech from its integral relationship with commercial transactions. *But see* Br. at 15 (heading defining commercial speech as expression that is "integrally related to a commercial transaction"). The government suggests that speech is commercial if it "*promotes* or *advances* an ordinary commercial transaction." Br. at 22 (emphasis added). "Promotion" and "advancement" of a commercial transaction are vague concepts that could redefine much expression as commercial speech. For example, a news story covering a charity's bingo game might well have the effect of promoting or advancing the bingo game by publicizing it. The government's explanation that this first element "limits the definition of commercial speech to speech about commercial products and services," *id.*, does not help at all. For example, the speech at issue in *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980), concerned a commercial product or service—electricity—yet was accorded the full protection of the First Amendment.

2. Speaker's "Financial Interest" in the Transaction or Its Promotion.

The second factor of the government's proposed test for commercial speech is "the relationship between the speaker, the subject matter, and his audience, *i.e.*, whether the speaker has a direct financial interest in

either the transaction or its promotion." Br. at 22. The government subtly changes the meaning of this second element a few lines later by restating it as "the financial interest of the speaker in the good or transaction." *Id.*

This second element again threatens to remove commercial speech from its anchor in a proposed or consummated commercial transaction. It is true that determining whether speech proposes or is an integral part of a commercial transaction between the speaker and its audience requires an examination of the relationship between the speaker and its audience. But the government's test goes beyond that to look at a speaker's financial interest in a product generally rather than in a specific transaction with its audience. Such a test would dangerously expand the scope of commercial speech because protected expression frequently comes from persons with a financial interest in their subject matter.

A speaker's entitlement to First Amendment protection is not determined by its financial interest in or motivation for its speech. The utility in *Consolidated Edison* clearly had a financial interest in its topic—nuclear power generation—but the speech was nonetheless accorded full First Amendment protection. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964), the Court held that the fact the Times had been paid to publish the advertisement at issue was as "immaterial" to its entitlement to First Amendment protection "as is the fact that newspapers and books are sold." As Samuel Johnson cogently observed, "No man but a blockhead ever wrote, except for money." J. Boswell, *The Life of Samuel Johnson* 623 (Apr. 5, 1776) (Modern Library).

First National Bank v. Bellotti, 435 U.S. 765 (1978), also confirms that a speaker's financial interest is irrelevant to the constitutional protection afforded speech. The appellants there were national banking associations and

business corporations that wanted to publicize their views on a proposed state constitutional amendment to impose an income tax. 435 U.S. at 768-69. As business corporations, their desire to speak obviously was motivated by financial interest. In determining whether their proposed speech was entitled to First Amendment protection, however, the Court looked at the content of the speech, not at the identity of the speakers and their financial interest. As the Court put it,

> the proper question . . . is not whether corporations "have" First Amendment rights . . . . Instead, the question must be whether [the statute at issue] abridges expression that the First Amendment was meant to protect.

435 U.S. at 776. To answer that question, the court examined the content of the appellants' proposed speech and, finding it to be "at the heart of the First Amendment's protection," *id.*, struck down the restrictions on it.

The irrelevance of a speaker's financial interest in the subject matter of his expression is further confirmed by *Quinn v. Aetna Life & Casualty Co.*, 482 F. Supp. 22 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980) and *Rutledge v. Liability Insurance Industry*, 487 F. Supp. 5 (W.D. La. 1979), where plaintiffs sought to enjoin liability insurers from publishing advertisements deploring high jury awards in tort cases. Both cases held that the advertisements were fully protected speech, not commercial speech, even though the insurance companies had a direct financial interest in their content. *See Rutledge*, 487 F. Supp. at 8 ("nor does the fact that [speech] reflects the advertiser's commercial and financial interests deny it constitutional protection").

The mischief that would be created by the financial interest portion of the government's proposed test can be illustrated by recent events. For example, the New York Times recently published advertisements concerning the

merger of Kraft and Philip Morris, *e.g.*, N.Y. Times, Oct. 18, 1988, at 45, cols. 4-6 (nat'l ed.), and thus under the government's theory presumably had some sort of "financial interest" in the "promotion" of that transaction, but this interest cannot transform the news stories and editorials that the Times published concerning the merger, *e.g.*, *id.*, Nov. 1, 1988, at 33, cols. 3-5 (nat'l ed.) and Nov. 14, 1988, at 22, cols. 1-2 (nat'l ed.) into commercial speech. *New York Times v. Sullivan*, 376 U.S. at 266.

3. The Proposed Test Is Not Supported by the Cases the Government Cites.

The government claims to have derived its proposed test from *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), but these cases do not support such a test.

Bolger held that two informational pamphlets published by Youngs, a manufacturer of condoms—one on condoms and the other on venereal disease and the effectiveness of condoms in preventing it—were commercial speech. In reaching this conclusion, the Court held that no one of three factors it enumerated was enough by itself to convert the pamphlets into commercial speech. That the pamphlets were conceded to be advertisements did not make them commercial speech, *Bolger* concluded, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). 463 U.S. at 66. This conclusion is also supported by *Consolidated Edison, Pacific Gas & Elec., Quinn v. Aetna* and *Rutledge v. Liability Insurance Industry, supra.*

Nor did reference in the pamphlets to specific products make them commercial speech, *Bolger* held, citing *Associated Students for Univ. of California v. Attorney General*, 368 F. Supp. 11, 24 (C.D. Cal. 1973). 463 U.S. at 66. Finally, *Bolger* held that "the fact that

Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech," *id.* at 67, citing *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975), *Ginzburg v. United States*, 383 U.S. 463, 474 (1966); and *Thornhill v. Alabama*, 310 U.S. 88 (1940). This conclusion is further supported by the discussion in Section III.B.2. above.

Although it held that none of these three factors alone made the pamphlets commercial speech, *Bolger* concluded that the combination of all of them provided "strong support" for its conclusion that they were commercial speech. 463 U.S. at 67.

Bolger is an unusual case that should be confined to its facts. The characterization of the pamphlets as commercial speech may have been influenced by the fact that one of them specifically referred to and described the advantages of a number of condoms manufactured by Youngs, *id.* at 66-67 n.13, and the other identified Youngs as the distributor of Trojan brand condoms and discussed the virtues of condoms in general.[13] *Id.* The pamphlets thus arguably proposed a commercial transaction—the purchase of condoms by their readers. Moreover, because *Bolger* held that regulation of Young's speech was not justified even under the lower level of First Amendment protection afforded commercial speech, the Court's characterization of its pamphlets as commercial speech was not necessary to its holding. The opinion suggested as much by noting that

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[13] Young's pamphlet regarding venereal disease, *Bolger* Joint Appendix at 38, extolled the virtues of condoms, noting that they are manufactured to "strict standards of strength, durability, and reliability," are "very easy to open, handle and use," and are available in "the whole range of required sensitivity levels." It also noted that "the pharmacist . . . is best able to offer the particular prophylactic to serve the individual need."

> [t]o the extent any of appellee's mailings could be considered noncommercial speech, our conclusion that [the statute at issue] is unconstitutional as applied would be reinforced.

463 U.S. at 66 n.11.

The government's citation of *Dun & Bradstreet* is misplaced. The plurality opinion there clearly states that the credit report at issue was *not* commercial speech. 472 U.S. at 762 n.8. But under the government's proposed test, the credit report apparently would constitute commercial speech, because it "promotes or advances an ordinary commercial transaction"—the decision whether or not to extend credit—and the speaker had a "direct financial interest" in the promotion of that transaction, having been paid for its credit report.

The government's citation of *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), to argue that commercial speech includes " 'the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees,' " Br. at 19, quoting *Ohralik*, is disingenuous at best. In fact, *Ohralik* cited those not as examples of commercial speech but rather to illustrate that " 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed,' " *Ohralik*, 436 U.S. at 456, quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), and to show that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." 436 U.S. at 456.

NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980) and *Allied Tube & Conduit Corp.*

v. Indian Head, Inc., No. 87-157 (June 13, 1988), are not commercial speech cases, as the government argues, but rather are further examples of situations where the government is not foreclosed from regulating commercial activity simply because speech is a component of the activity. *Retail Store Employees* held that a ban on secondary picketing did not violate the First Amendment because the picketing constituted conduct aimed at "coercing a neutral party to join the fray," 447 U.S. at 616 (plurality opinion). *See also* 447 U.S. at 619 (Stevens, J., concurring) ("picketing is a mixture of conduct and communication"). *Allied Tube & Conduit Corp.* did not consider whether petitioner had engaged in commercial speech. Rather, it was clear that petitioner had engaged in commercial activity—an agreement to exclude respondent's product from a building code, slip op. at 2—that could be regulated despite the fact that speech was a component of the activity.[14]

CONCLUSION

Even if the Court had jurisdiction over this appeal—and MNA respectfully suggests that it does not because of mootness—the Court should not undertake in this case the delicate task of drawing the boundary between commercial speech and fully protected speech. This appeal poses that difficult question only in the abstract, and on an undeveloped factual record.

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[14] MNA believes that application of Section 1302 to prohibit the mailing of prize lists for lawful games of chance would fail the four-part test of *Central Hudson*, 447 U.S. at 566, even under the government's construction limiting Section 1302 to commercial speech other than advertising, and thus would be an unconstitutional restriction of speech. Specifically, MNA believes the government has no substantial interest in regulating such speech and, even if it has a substantial interest, that Section 1302 does not directly advance it and is more extensive than necessary to serve it. Because MNA has no interest in prize lists appearing in commercial speech other than advertising, however, it will not expand on this point.

The boundary between commercial speech and other forms of expression must be drawn with great care to ensure that speech entitled to First Amendment protection is not impermissibly regulated as commercial speech. The government's proposed test for commercial speech is unacceptable because it would sanction regulation of speech that should receive full First Amendment protection.

The Court should vacate the decision below to the extent it applies to the mailing of prize lists contained in speech other than news stories and editorials, and should remand the case to the district court with instructions to dismiss MNA's complaint to the extent the judgment has thus been vacated.

Respectfully submitted,

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No. 87-1956

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF FOR THE APPELLANTS

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1956

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF FOR THE APPELLANTS

1. Appellee suggests (Br. 5-8) that our appeal in No. 87-1956 is moot because our interpretation of the prize list clause of 18 U.S.C. 1302 eliminates any controversy between the government and appellee.[1] Appellee states that it is interested only in publishing lottery prize lists in the form of news stories (or similar commentary) or advertisements. Since, in appellee's view, we have argued that the prize list clause does not apply either to news stories or to advertisements, appellee

[1] Appellee also suggests (Appellee Br. 3) that the case is moot because of the enactment of the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205, and the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988). We showed in our opposition to appellee's earlier motion to dismiss (at 2-4) why that claim is wrong, and this Court denied appellee's motion on January 9, 1989. We rely here on our discussion in our earlier pleading.

submits that the prize list clause will not affect appellee's interests, and this case is now moot. Appellee is wrong for three reasons.

First, appellee has misconstrued our interpretation of Section 1302. We argued in our opening brief that the district court erred in ruling that the prize list clause applies to news stories, editorials, or similar commentary about lotteries. Fed. Br. 15-30. Noting that lists of prizes were often published separately during the period before the Act became law, we argued that Congress adopted a prize list clause in addition to the advertisement clause in order to ensure that the Act would apply to publications that list the prizes offered by a lottery, even if that list was not accompanied by the type of promotional features that would normally be found in an "advertisement." Fed. Br. 23-24 & n.27. Compare *id.* App. 13a (a contemporary advertisement) with *id.* at 14a (a contemporary prize list). We did not contend, however, that the prize list clause does not apply to advertisements that contain prize lists. Advertisements that list lottery prizes, such as the publication reprinted in an appendix to our opening brief, *id.* at 11a-12a, would be covered by both clauses of the Act. In other words, the two clauses in the statute overlap somewhat; they are complementary but not mutually exclusive. Thus, since appellee wishes to carry lottery-related advertising that includes prize lists (Appellee Br. 5-6, 10, 20 n.14), the prize list clause will affect appellee's interests.

Second, the mootness doctrine that appellee invokes bars the courts from exercising jurisdiction over a case in which the plaintiff will neither benefit from a favorable judgment nor suffer from an adverse one.

E.g., DeFunis v. *Odegaard,* 416 U.S. 312 (1974). That is not true here. On the one hand, if the judgment below is affirmed appellee's members can immediately and without restriction use the mails to distribute lottery prize lists that appellee's member newspapers have been paid to publish. On the other hand, if the judgment below is reversed appellee's member newspapers will not be free to use the mails to distribute such prize lists until the exemptions added by the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205, go into effect in 1990. The Court's affirmance or reversal of the judgment below will therefore have a beneficial or burdensome effect on appellee, and that is sufficient to show that the controversy between the parties is still a live one.[2] A case does not become moot simply because the party that prevailed in the court below concedes that the judgment below is wrong, either in whole or in part, and does not seek to defend it. See, *e.g., Ray* v. *United States,* No. 86-281

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[2] Appellee errs in relying (Br. 7-8) on *Deakins* v. *Monaghan,* No. 86-890 (Jan. 12, 1988). In *Deakins,* the plaintiffs brought an action in federal court seeking the return of documents that the plaintiffs claimed had been illegally seized. The lower federal courts rejected the plaintiffs' claim for injunctive relief. By the time the case reached this Court, a state trial court had assumed jurisdiction over the seized materials and had ruled that certain of the documents had been illegally seized; pending before that court were motions seeking the return of the remaining documents. Under those circumstances, affirming or reversing the court of appeals' judgment on the propriety of abstaining from plaintiffs' claim for injunctive relief would not have had any effect on the plaintiffs. The state trial court had already granted their request in part, and the federal district court could not have granted a later request for an injunction, since by then the plaintiffs had been indicted. By contrast, in this case appellee will benefit if the district court's judgment is upheld, since that court entered an injunction against the government. Appellee also will be adversely affected if the judgment below is reversed, since appellee will then be subject to the prize list clause, however it is construed.

(May 18, 1987); *Marks* v. *United States*, 430 U.S. 188, 191-192 n.6 (1977); *Sibron* v. *New York*, 392 U.S. 40, 58-59 (1968); *Young* v. *United States*, 315 U.S. 257, 258-259 (1942). There is no reason to adopt a different rule when the successful party in the court below decides not to challenge affirmatively the position taken by the party that is seeking to have the judgment below overturned.[3]

Third, although appellee has not submitted any argument why the prize list clause should be read to apply to news stories and editorials, appellee nevertheless asks this Court to leave in place that portion of the judgment holding the application of the prize list clause to such expression unconstitutional. See Appellee Br. 21 ("This Court should vacate the decision below *to the extent that* it applies to the mailing of prize lists contained in speech other than news stories and editorials") (emphasis added). Appellee's position on the merits therefore differs from ours. We have argued that the prize list clause does not apply to news stories and editorials; appellee maintains that the prize list clause is unconstitutional as it applies to news stories and

[3] If a case became moot simply because the party that was successful in the lower court agreed that the judgment of that court should be reversed, this Court could not invite an amicus curiae to defend that judgment, as the Court has done on various occasions, *e.g.*, *Bob Jones University* v. *United States*, 456 U.S. 922 (1982), 461 U.S. 574 (1983), since this Court lacks authority to revive a case that has become moot. Also, if the mootness doctrine extended as far as appellee suggests, then the courts would be powerless ever to deny a plaintiff's motion for a voluntary dismissal, and Fed. R. Civ. P. 41(a)(2), which conditions the grant of such motions on leave of the district court, would be meaningless. See also Fed. R. App. P. 42(b) (providing for dismissal by the parties and dismissal by the appellant, but not providing for dismissal by the appellee); Sup. Ct. R. 53.1 and 53.2(a) (same). Cf. *Druid Hills Civic Ass'n* v. *FHA*, 833 F.2d 1545, 1549 (11th Cir. 1987), cert. denied, No. 87-1891 (Oct. 3, 1988).

editorials. Appellee thus asks the Court to render a different judgment than the one we urge.

2. Appellee also suggests (Br. 8-10) that the government's appeal should be dismissed because the record in this case is insufficient for the Court to decide whether the prize list is facially valid. That suggestion lacks merit.

The questions before this Court are legal, not factual. The first involves the meaning of the prize list clause. That is a straightforward question of statutory construction as to which an elaborate factual record is unnecessary. The second concerns the facial validity of the prize list clause, as so construed. An elaborate evidentiary record is unnecessary to resolve that issue, since the issue whether a legislative restriction on commercial speech is lawful does not ordinarily turn on adjudicative facts. The purpose of the Anti-Lottery Act of 1890—to help states that forbid private lotteries to protect the public from their harms—is evident from the legislative and historical background of that law and from *In re Rapier*, 143 U.S. 110 (1892), and *Ex parte Jackson*, 96 U.S. 727 (1877). A factual record is unnecessary to decide whether that purpose is "substantial" under *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), since this Court has repeatedly held that it is. *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 341 (1986).[4]

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[4] See also *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 167-168 (1850); *Boyd* v. *Alabama*, 94 U.S. 645, 650 (1876); *Ex parte Jackson*, *supra*; *In re Rapier*, *supra*; *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1879); *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321, 355-356 (1903); *Otis* v. *Parker*, 187 U.S. 606, 609 (1903); *Ah Sin* v. *Wittman*, 198 U.S. 500, 505-507 (1905); *Lewis* v. *United States*, 348 U.S. 419, 422-423 (1955), overruled on other grounds, *Marchetti* v. *United States*, 390 U.S. 39 (1968).

An elaborate factual record is unnecessary to decide whether the Act directly advances that purpose. That question is generally a matter of legislative judgment, not adjudicative fact, as the Court recognized in *Posadas* and other cases,[5] and this Court implicitly resolved that issue when upholding the Act in *In re Rapier*. Finally, a factual record is unnecessary to decide whether the mailing restrictions in Section 1302 unduly restrict speech. That is a classic question of law, not fact.[6]

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[5] See *Posadas*, 478 U.S. at 340-344 (upholding a restriction on gambling advertising in part since the legislature could reasonably have believed that it was necessary to safeguard the public welfare and would directly advance that interest); *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 508-509 (1981) (plurality opinion) (upholding a restriction on commercial billboard advertising; rejecting the argument that "the record is inadequate to show any connection between billboards and traffic safety" by relying on the "common-sense judgments" of legislators and lower courts that billboards do pose substantial traffic safety hazards); *Central Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for [the product]."); *New York State Liquor Auth.* v. *Bellanca*, 452 U.S. 714, 717-718 (1981) (relying on a finding by the state legislature that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior" and that "legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand"). See also *Dunagin* v. *City of Oxford*, 718 F.2d 738, 748-749 n.8 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984) (whether the direct advancement step of *Central Hudson* is met is not a question of fact under Fed. R. Civ. P. 52(a)); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 500-501 (10th Cir. 1983) (same), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984). See generally Fed. R. Evid. 201 Advisory Committee Notes on Proposed Rules, 28 U.S.C. at 683-684 (discussing differences between adjudicative and legislative facts).

[6] Appellee's reliance (Br. 9-10) on *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972), is misplaced. There, the district court held unconstitutional every law challenged by the plaintiffs except one, which required a political party to submit a loyalty oath. After both sides filed appeals to this Court, the state legislature revised the election code and rendered

At bottom, appellee has confused the difference between a ruling that a statute is unconstitutional on its face and a ruling that a statute is unconstitutional as applied. Appellee is correct that the record in this case does not contain examples of the types of prize lists appellee's member newspapers would like to print. The record is therefore insufficient to decide whether the prize list clause is invalid as applied to a particular publication. But the district court held the prize list clause facially invalid, and the record is ample to determine whether that ruling is correct.[7] A law may not be held facially invalid under the First Amendment unless its every application creates an impermissible risk of suppression of ideas, or poses a realistic danger that it will significantly compromise recognized First Amendment protections of parties not before the court. *New*

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moot all of the issues decided by the district court except the constitutionality of the loyalty oath requirement. This Court dismissed the plaintiffs' appeal on that claim.

This case involves the opposite situation. The district court held a federal statute unconstitutional at the plaintiff's request, and enjoined the government from enforcing that law and related postal laws against any party. The district court's judgment therefore clearly injures the federal government by preventing a validly enacted federal law from being enforced. Moreover, unlike the plaintiffs in *Socialist Labor Party*, the federal government cannot bring another lawsuit in order to vindicate its interests. And a dismissal of the government's appeal is not a valid option in this case, since that order would leave the district court's judgment intact. The decision in *Socialist Labor Party* is therefore of no assistance to appellee.

[7] The case appellee cites (Br. 9), *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), explains the very difference that appellee obscures. There, the Court held that the record was insufficient to determine whether the Surface Mining Act, 30 U.S.C. 1201 *et seq.*, was unconstitutional as applied to any particular parcel of land. The Court therefore limited its review to the facial constitutionality of the Act. 452 U.S. at 294-297. That is also the appropriate course here.

York State Club Ass'n, Inc. v. *New York,* No. 86-1836 (June 20, 1988), slip op. 8. If the prize list clause can lawfully be applied under some circumstances, and appellee appears to admit that it can (see Appellee Br. 13, referring to *Horner* v. *United States,* 147 U.S. 449 (1893)), then the district court erred in holding that clause facially unconstitutional, because the overbreadth doctrine does not apply to commercial speech. *E.g., Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 496-497 (1982); *Central Hudson,* 447 U.S. at 565 n.8. The proper course in this situation is to reverse the judgment below, not to remand the case for an evidentiary hearing.

3. Amici American Civil Liberties Union and Minnesota Civil Liberties Union maintain (ACLU-MCLU Br. 13-27) that the district court was correct in ruling that the prize list clause applies to news stories. Amici rely on the text of that clause, but they do not discuss its historical background, its purposes, the Court's decision in *Horner* v. *United States, supra,* or any of the other materials we cited in our brief. Those materials show that Congress adopted that law in order to prevent the mails from being used to promote the financial success of a lottery, in particular the Louisiana Lottery, and not to prevent newspapers from sending news stories about lotteries through the mails.[8] Finally,

[8] The other items cited by amici to support their argument are irrelevant. Amici repeatedly, but erroneously, state (ACLU-MCLU Br. 10-11 n.5, 13-14, 18, 19) that the government argued in the district court that the prize list clause should be read to reach prize lists in news stories. In fact, it was the MCLU which took that position in district court; the government took the opposite position. Compare Amicus Minnesota Civil Liberties Union's Memorandum in Support of Plaintiff's Motion for Summary Judgment 7-9 (Aug. 28, 1987) with Defendants' Memorandum of Law in

amici have offered no good reason why the prize list clause should not be construed in a manner that would avoid an unconstitutional interpretation. In a closely analogous context, this Court in *United States* v. *12 200-Ft. Reels of Super 8MM. Film,* 413 U.S. 123, 130 n.7 (1973), said that it would interpret the term "obscene" in a federal statute prohibiting the importation of obscene material in a manner that was consistent with the definition of obscenity adopted in *Miller* v. *California,* 413 U.S. 15 (1973). A similar analysis is appropriate in this case.

4. Appellee (Br. 10-20) and amicus Association of National Advertisers (ANA Br. 27-45) contend that our definition of commercial speech is wrong. Appellee's proposed alternative definition of commercial speech, however, is underinclusive. Appellee would limit the commercial speech doctrine to expression that either proposes a commercial transaction or is an integral part of a commercial transaction. Appellee Br. 12-14. But this would exclude from the scope of commercial speech general promotional or "image advertising"—such as a commercial touting the benefits of a new line of shampoo, or a pamphlet extolling the benefits of a line of sneakers. Such material clearly promotes or advances a commercial transaction, even though it is

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Response to the Memoranda Filed in Support of Plaintiff's Motion for Summary Judgment 5-6 (Sept. 8, 1987). See also Memorandum of Law in Support of Defendants' Motion for Summary Judgment 18-19 (filed Sept. 2, 1987). Amici also rely (ACLU-MCLU Br. 23-24) on regulations adopted by the Postal Service to implement the statute, but those regulations simply mirror the text of the Act. Finally, amici's reliance (ACLU-MCLU Br. 25-27) on the affidavits submitted by appellee is misplaced. The affidavits do not state that we have applied the prize list clause to news stories, and even if they did, that would at most show that individual postal employees misread the prize list clause.

not "directly related to a proposed commercial transaction" (Appellee Br. 12). And this Court has never suggested that promotional advertising of this type is not commercial speech. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

Otherwise, most of appellee's and ANA's criticisms of our definition rest on a misinterpretation of it. In our view, for speech to be commercial it must relate to an ordinary commercial transaction *and* must be made by a person with a direct financial interest in the transaction or in its promotion. For example, a bona fide news story about a bingo game or the merger of two corporations (Appellee Br. 14, 16-17) would not be commercial speech, because the newspaper would not have been paid to write it. And a corporation's criticism of a proposed state income tax (Appellee Br. 15-16, discussing *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765 (1978)), or a physician's objection to socialized medicine (ANA Br. 30) would not be commercial speech because such criticism would not promote an ordinary commercial transaction, even though the speaker might profit, for example, from the defeat of a proposed state income tax or a plan of socialized medicine. Fed. Br. 20-22, 29-30. Of course, in drawing a line between commercial and noncommercial speech, problems will emerge under our proposed definition, as under any other, and the courts should perhaps be willing to give the benefit of the doubt to speech that falls close to the line. But in this particular context, our proposed definition should be relatively easy to apply. A newspaper can easily tell, for example, whether it has been paid to publish a list of the prizes awarded at a lottery drawing. Accordingly, there is no basis to appellee's and ANA's

fears that our proposed definition of commercial speech will deter newspapers from publishing bona fide news stories about lotteries.

In any event, it is not necessary for the Court to agree or disagree with our proposed definition of commercial speech in order for the Court to reverse the judgment below. As we pointed out in our opening brief (at 29 n.32), a list of the prizes to be awarded by a lottery at a future drawing is an implicit proposal to engage in a commercial transaction and therefore falls within "the core notion of commercial speech." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. at 66. See *Central Hudson*, 447 U.S. at 580 (Stevens, J., concurring in the judgment) ("A salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept.") (footnote omitted). The statute unquestionably applies to prize lists such as the circular containing a list of prizes awarded in the lottery conducted by the Austrian government at issue in *Horner* v. *United States,* 147 U.S. at 451-453 n.1, 467, and such a prize list would fall within the core notion of commercial speech.[9] Accordingly, this Court's decision in *Horner* provides a sufficient basis for reversing the district court's judgment that the prize list clause is facially unconstitutional, since the *Horner* case shows that the prize list clause can be applied in a constitutional manner. See *New York State Club Ass'n, Inc.* v. *New York*, slip op. 8.

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[9] Even appellee concedes (Appellee Br. 13) that a prize list as the one in *Horner* is at least "arguably" an example of the core notion of commercial speech.

5. Appellee (Br. 20 n.14) and amicus ANA (ANA Br. 27-45) also contend that the mailing restrictions in the prize list clause are invalid under the standard adopted in *Central Hudson*. Appellee, however, makes no argument to support that conclusion. ANA, for its part, overlooks the crucial difference between commercial organizations and commercial speech. See ANA Br. 32. Just as a commercial organization may engage in political expression in order to advance its profitmaking interests, *e.g.*, *First Nat'l Bank* v. *Bellotti*, *supra*, so too a charitable organization may use commercial speech in order to serve its eleemosynary goals. It is the nature of the expression that an organization uses, not the nature of the organization, that determines whether its expression is commercial or political. See *First Nat'l Bank* v. *Bellotti*, *supra*. Otherwise, ANA principally relies (see ANA Br. 27-45) on the arguments that were made in dissent in the *Posadas* case,[10] which we have already addressed in our opening brief.

6. Finally, amicus ANA contends (ANA Br. 13-22) that 18 U.S.C. 1302 cannot constitutionally be applied to forbid the use of the mails to materials that are lawful at either the point of distribution or the point of receipt. ANA's argument blends together the notion that Congress lacks a general police power, the theory that the First Amendment should prohibit all legislative efforts to restrict the commercial promotion of legal activities, and the belief that a restriction on the ability of a majority of states to promote private commercial gaming is inconsistent with principles of federalism.

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[10] Indeed, ANA goes so far as to say that "[i]t is not necessary to consider the correctness of the *Posadas* case since the federal government lacks a national police power." ANA Br. 40 n.8.

None of those theories, or all three considered together, are persuasive.

a. The district court correctly held that it is irrelevant that private lotteries are legal under Minnesota law. J.S. App. 10a. Congress's power under the Postal Clause of Art. I, §8, Cl. 7, "embraces the regulation of the entire postal system," *Ex parte Jackson*, 96 U.S. at 732, and authorizes Congress to close the mails to the intra- or interstate distribution of commercial speech promoting a lottery whether or not it is legal under a particular state's law. *Ex parte Jackson*, *In re Rapier*, and *Posadas* held that the federal and state governments may restrict the commercial promotion of gambling in order to protect the public against the potentially injurious effects that gambling can have on society.[11] Moreover, *In re Rapier* implicitly rejected ANA's contention that Congress cannot exercise its

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[11] We pointed out in our opening brief (at 34) that this Court has recognized that Congress may exclude from the mails "such printed matter or merchandise as may seem objectionable to it upon the ground of public policy." *Public Clearing House* v. *Coyne*, 194 U.S. 497, 507 (1904). ANA suggests (ANA Br. 16) that the *Coyne* decision is no longer good law in light of *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946), but ANA is wrong, for two reasons. First, *Hannegan* involved the scope of the Postmaster General's authority under the Classification Act of 1879, 39 U.S.C. 226 (1940 ed.), to deny second class mailing privileges to a magazine. *Hannegan* held only that the *Postmaster General* lacked inherent authority to exclude material from the mail on public policy grounds. It did not hold that *Congress* lacks the constitutional power under the Postal Clause to bar material from the mails on such grounds. Second, Justice Black's opinion for the Court in *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948), expressly relied on *Coyne* as supporting the constitutionality of what is now 39 U.S.C. 3005 (1982 & Supp. IV 1986), which authorizes the Postmaster General to return mail sent by the perpetrator of a scheme for obtaining money by fraudulent representations. 333 U.S. at 190-191. The decision in *Coyne* therefore is still good law.

postal power in a manner that is inconsistent with state law, because the lottery at issue there, the Louisiana Lottery, was lawful under state law. Those decisions, which ANA barely cites and does not distinguish, directly support the constitutionality of Section 1302.

In dealing with the mailing of lottery-related promotional materials, Congress has followed the same policy that it has endorsed for more than a century regarding the use of the mails to distribute obscene materials. Since the Comstock Act of 1872, ch. 335, §148, 17 Stat. 302, Congress has prohibited the mailing of obscene matter without regard to whether the mailing is inter- or intrastate, or whether the state in which the matter is sent or received itself forbids the distribution of obscene materials. The Court expressly upheld that scheme in *Smith* v. *United States*, 431 U.S. 291 (1977), holding that Congress can make it a federal offense to mail obscene materials into a state that does not itself make the possession of obscene materials a crime. As Justice Blackmun wrote for this Court, "the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive State." 431 U.S. at 307. *Smith*, like *In re Rapier*, therefore recognizes that whenever Congress regulates the use of the mails, it is constitutionally irrelevant whether the state where the mail is sent or received also regulates the underlying activity.

Bigelow v. *Virginia*, 421 U.S. 809 (1975), on which ANA heavily relies (ANA Br. 18, 20, 38-39, 43) is inapposite. *Bigelow* involved the constitutionality of

the application of a Virginia law restricting the advertising of abortion services to a newspaper advertisement about the availability of abortions in New York. The advertising restrictions in that case were held invalid, as the Court explained in *Posadas,* 478 U.S. at 345-346, because "the underlying conduct * * * was constitutionally protected and could not have been prohibited by the State." That objection cannot be raised here. ANA relies (ANA Br. 38-39) on a passage in *Bigelow* explaining that Virginia did not have a legitimate interest in restricting the advertising of goods or services that could be legally sold in New York, but that point does not apply to this case. If a state can ban lottery advertising within its borders, and *Posadas* held that a state can,[12] then Congress should be free to assist that state to implement its policy judgment by preventing other states from using the mails to distribute lottery advertising.

b. There is also no merit to ANA's argument that the First Amendment forbids Congress from placing limits on the commercial advertising of an activity that is legal under state law. Aside from the fact that *Posadas* rejected that proposition, ANA's argument is unpersuasive as a matter of policy. Gambling is a recurring problem of an imperfect society, and Congress and the states may prohibit that activity entirely. The experience with Prohibition, however, suggests

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[12] Congress also recently concluded that the states have that authority. As we explained in our opening brief (at 9), Congress postponed until 1990 the effective date of the Charity Games Advertising Clarification Act of 1988 in order to give the states the opportunity to decide, in light of the new amendments tc Section 1302, whether to prohibit lotteries altogether, or to forbid lotteries from advertising.

that a ban on a disfavored activity, such as the consumption of alcohol, can be more harmful than a system allowing that activity to be conducted under strict governmental oversight and control. Governments therefore compromise: They allow some forms of gaming, but limit their operation. A common limitation is to restrict or forbid advertising, since advertising spurs demand.

Section 1302 typifies the compromise adopted by governments on this issue. It represents an intermediate position between imposing a ban on a potentially harmful activity, and permitting the sponsors of that activity freely to enhance consumer demand through advertising. As *Posadas* noted, only "a strange constitutional doctrine" would require government to suffer unlimited promotion of a commercial activity that may be prohibited altogether. 478 U.S. at 346.[13]

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[13] Professor Richard Epstein recently summarized the policy rationale underlying laws such as 18 U.S.C. 1302, as well as the justification for upholding the constitutionality of that policy judgment. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 65-66 (1988) (footnote and emphasis omitted):

> One reason to legalize gambling is simply damage control. It is better that people not gamble, not only for their own personal character, but also for the corrosive effect gambling has on family and business obligations. Nonetheless, it is just too costly to try to control gambling by criminal sanctions. Better therefore to legalize the "disfavored" activity, which can then be taxed to keep participation within reason. Disfavored activities, moreover, need not be treated like all other business activities. Advertisement stimulates business, so it might be proper for a state to decide that, while it should not ban gambling, it should nonetheless moderate its growth by banning advertising. Surely if the issue were the legalization of marijuana and other drugs, a respectable argument could be made to allow their sale, subject to a general tax and to prohibitions or restrictions on advertising, which, because of advertising's public visibility, should be

c. Finally, there is no merit to ANA's suggestion that Section 1302 is unconstitutional because it is inconsistent with the judgment of a majority of the states that some forms of gambling should be permitted. Congress adopted a uniform rule in order to protect the interests of those states that have decided that private lotteries are contrary to public policy. That rule is not irrational simply because those states, which were once in a majority, are now in a minority. ANA cites no decision suggesting that Congress lacks the authority to decide which of two competing policies should be implemented as a matter of federal law, or that, when refereeing a policy dispute among the states, Congress must endorse whatever policy is held by the majority of states. ANA's argument goes to the issue whether it is wise to restrict the distribution of lottery-related materials through the mails, and Congress has recently decided to relax the mailing restrictions somewhat. But that issue is for Congress to resolve, since Congress is in the best position to resolve interstate disputes. Cf. *South Carolina* v. *Baker,* No. 94, Orig. (Apr. 20, 1988),

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reasonably easy to enforce. In effect we have adopted such a strategy with respect to cigarettes, which are sold, heavily taxed, and subject to advertisement restrictions, at least on television and radio. Given the absence of any coherent social attitude toward gambling (or toward drugs, alcohol, tobacco, or prostitution), courts should exercise some deference to state restrictions on such activities, which fall within the traditional "morals" head of the police power as it relates to both property and speech.

That, in a nutshell, is the reason why states restrict the commercial promotion of gambling. The Anti-Lottery Act of 1890 was designed to implement that policy judgment.

slip op. 5-7; *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-554 (1985).[14]

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

WILLIAM C. BRYSON
Acting Solicitor General

MARCH 1989

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[14] There is no merit to ANA's argument (ANA Br. 45-48) that Congress cannot prohibit the use of the mails to promote private lotteries if Congress allows the mails to be used to promote state-run lotteries. The distinction drawn by 18 U.S.C. 1307 between state and private lotteries does not discriminate on the basis of the content of expression or the viewpoint of any speaker; the line it draws is based on the nature of the party responsible for operating a lottery. That distinction is also a rational one. Congress could reasonably believe that a state-run lottery would be less susceptible to infiltration by organized crime than a private lottery. Fed. Br. 36. Moreover, Congress could reasonably decide that federalism principles justified affording the states greater leeway in raising revenues than private parties. Fed. Br. 33 & n.34.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,

Appellants,

—v.—

MINNESOTA NEWSPAPER ASSOCIATION, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF NATIONAL ADVERTISERS IN SUPPORT OF APPELLEE

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QUESTIONS PRESENTED

1. Does the combined effect of Congress' enactment of the Charity Games Advertising Clarification Act of 1988 (Pub. L. No. 100-625) (Nov. 7, 1988) and appellee's assertion that a live controversy no longer exists render it inappropriate for the Court to consider the merits?

2. Should 18 U.S.C. 1302 be construed to authorize the Postmaster to exclude truthful communications from the mails when the communications relate to activity that is lawful both at the point of mailing and the point of receipt?

3. If 18 U.S.C. 1302 is construed to authorize the exclusion of such communications from the mails, does the statute violate the First Amendment, as well as fundamental principles of cooperative federalism?

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INTEREST OF AMICUS CURIAE[1]

The Association of National Advertisers, Inc., (A.N.A.) is an organization devoted to the advancement of truthful advertising as a means of fostering the capacity of individual Americans to make informed and autonomous choices concerning lawful economic options. A.N.A.'s members place more than 80% of all national and regional advertising in the United States. A.N.A. believes that government's only legitimate role in the in the regulation of commercial advertising is to assist consumers in receiving truthful information relevant to the making of informed, autonomous choices among

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[1]The parties have consented to the filing of this brief. Pursuant to Rule 36.2, letters of consent are being filed with the Clerk of the Court.

lawful products and services. Amicus believes that attempts by well-meaning government officials to go beyond that important role and to use advertising regulation as a back-door method of manipulating consumer choice are both inconsistent with the postulates of a free society and violative of the First Amendment. The attempt in this case to bar truthful speech concerning lawful economic options from the mails poses difficult and far-reaching issues of federalism, free speech and statutory construction. A.N.A. respectfully submits this brief amicus curiae in the hope that it will aid the Court in its analysis.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case set forth in the brief of the Minnesota Newspaper Association.

SUMMARY OF ARGUMENT

Since the Solicitor General concedes that 18 U.S.C. 1302 cannot be invoked against news columns or editorial comment; and since Congress has removed the restrictions on newspaper advertising of lawful charitable gaming, the only issue remaining in this case involves the direct mailing of prize lists. The absence of any party with an interest in engaging in such direct mailing renders it inappropriate to consider the applicability of 18 U.S.C. 1302 to such direct mail practices.

If the Court chooses to reach the merits, 18 U.S.C. 1302 should be construed narrowly, in accordance with the assumptions of its enactors, to exempt truthful speech concerning behavior that is lawful at the point of mailing and the point of receipt.

If the Court construes 18 U.S.C. 1302 to authorize the Postmaster to ban truthful speech about lawful activity, the statute violates the First Amendment. The prize lists at issue herein cannot be characterized as commercial speech because the speakers' interests; the messages' contents; and the hearers' interests are far broader than the narrow decision whether to enter into a discrete commercial transaction. Moreover, even if the speech is characterized as "commercial", it cannot be suppressed under the four-part Central

Hudson test. The federal government does not have a "substantial interest" in deterring speech about activity deemed lawful under the consensus police power judgments of the States. Indeed, given this Court's decision in Bigelow v. Virginia, 421 U.S. 809 (1975), such an interest in censorship cannot even be called "legitimate". In addition, the government's interest in deterring organized crime in this context - if such an interest survived the passage of Pub. L. 100-625 - would not be "directly advanced" by banning prize lists mailed by regulated state charities. Moreover, both asserted governmental interests - assuming they survive Bigelow and Pub. L. 100-625 - can be equally advanced without resorting to censorship - by blocking mail only to those few States where all gambling is unlawful; and by

supervising charitable gaming to guard against infiltration by organized crime. Finally, when, as here, government competes economically with private entities, government may not award itself a competitive advantage by censoring the speech of its private competitors, while simultaneously exploiting a self-awarded information monopoly.

ARGUMENT

18 U.S.C. 1302 MAY NOT BE APPLIED TO BAN TRUTHFUL SPEECH FROM THE MAILS CONCERNING ACTIVITY THAT IS LAWFUL AT THE POINT OF MAILING AND THE POINT OF RECEIPT

A. The Precise Issue Raised By This Appeal

The unfortunate procedural history of this appeal has generated confusion concerning the precise issues before the

Court. The almost total absence of a factual record; the questionable decision by the District Court to couch its analysis in facial terms; the shifting nature of the legal landscape caused by Congress' repeal of the operative restrictions as of 1990; the attempt by appellee to withdraw from the litigation because Congress has adequately responded to its concerns; and the Solicitor General's attempt to force a continuation of this appeal in an effort to revive the prize list clause of 18 U.S.C. 1302 for possible future use against unlawful gambling activity, have resulted in complex briefs discussing a host of abstract issues, including: (1) the amorphous dividing line between commercial and non-commercial speech; (2) the degree of protection available to commercial speech; (3) the ill-defined relationship

between the federal government's delegated powers under the postal and commerce clauses and the States' reserved police powers; (4) the federal government's power to ban unlawful or obscene speech from the mails; and (5) the potential relationship between interstate lotteries operated by profit-making commercial entities and organized crime.

Lost in the welter of abstractions and hypothetical applications of 18 U.S.C. 1302, however, is the fact that this "case or controversy" involves the mailing of Minnesota newspapers to subscribers, the vast bulk of whom reside in Minnesota, containing information about lawful gaming activities by Minnesota charities. Thus, the case does not implicate the government's power to use 18 U.S.C. 1302 to exclude information about unlawful gambling

from the mails.

Moreover, given Congress' enactment of the Charity Games Advertising Clarification Act of 1988, the case does not even raise the question of whether the federal government possesses power to block the flow of speech about economic activity that is lawful in the sending state, but unlawful in the receiving state.[2] Compare, Bigelow v. Virginia, 421 U.S. 809 (1975) with Smith v. United States, 431 U.S. 291 (1977).

On the sparse record below, the only issue before the Court is whether 18 U.S.C. 1302 may be applied to bar the mailing of truthful information concerning lawful gaming activity by Minnesota charities to willing recipients, the vast bulk of whom

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[2]Amicus believes strongly that, under Bigelow, no such power exists. See infra, at 38-40.

are Minnesota residents. Such a mailing may occur in three contexts: (1) the mailing of a Minnesota newspaper containing news or editorial comment about charitable gaming; (2) the mailing of a Minnesota newspaper containing paid advertisements concerning charitable gaming; and (3) the mailing of prize lists or other descriptive material by a Minnesota charity directly to a willing recipient.

The Solicitor General concedes, as he must, that 18 U.S.C. 1302 cannot possibly be applied to ban the mailing of news or editorial comment. Moreover, Congress, by enacting the Charity Gaming Advertising Clarification Act of 1988, has eliminated 1302 as a bar to newspaper advertisements for lawful charitable gaming. Thus, the only remaining legal issue posed by this appeal is whether 18 U.S.C. 1302 may be

applied to direct mail communications between a Minnesota charity engaged in lawful charitable gaming and willing addressees, most of whom reside in Minnesota.

Amicus believes that the absence from this litigation of any party with an interest in engaging in direct mail communication is fatal to the Court's jurisdiction to pass on the direct mail issue. E.g. City of Los Angeles v. Lyons, 461 U.S. 95 (1983); United States v. Raines, 362 U.S. 17, 21 (1960).[3] If,

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[3]While this Court has permitted litigants to raise the rights of absent third persons in free speech cases, it has done so only in settings where it would otherwise be difficult to assure the protection of third-party rights. E.g. NAACP v. Alabama, 357 U.S. 449 (1958); Broadrick v. Oklahoma, 413 U.S. 601 (1973). No such concern attaches to the ability of Minnesota charities to protect their own rights. Indeed, the express reluctance of appellee to act as surrogate for the Minnesota charities in this Court counsels

however, the Court deems it appropriate to reach the merits,[4] amicus believes that truthful information about lawful gaming activity may not be barred from the mails under 18 U.S.C. 1302 because the statute should not be construed to apply to truthful information concerning activity that is lawful both at the point of mailing and the point of receipt;[5] and because, if

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strongly against proceeding on a ius tertii analysis.

[4]Since the Congressional repeal of the advertising ban will not take effect until 1990, the Court possesses technical jurisdiction over the facial aspects of the District Court's opinion. Given appellee's willingness to await the effective date of the statute, however, no need to reach the merits exists.

[5]The vast bulk of potential addressees herein reside in Minnesota. Moreover, since most states now permit significant forms of gambling, especially by charities, even mail addressed out of state will, generally, involve activity that is lawful at the place of receipt. The possibility that a relatively small number of letters will be addressed to the few states that

the statute is deemed applicable, it would violate fundamental principles of federalism and free speech.

B. The Federal Postal Power, the State Police Power and the First Amendment

The resolution of legal issues posed by attempts to exclude communications from the mails that are both lawful and truthful turns on the interplay of three constitutional concepts; (1) the grant of power under Article I, Section 8 to Congress "to Establish Post Offices and Post Roads"; (2) the decision to vest the police power exclusively in the States; and (3) the restraints placed on the exercise

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ban all gambling cannot be permitted to block the transmission of wholly lawful messages to residents of the remaining states. Indeed, it is doubtful whether censorship can ever be used to block residents of one state from learning about activity that is lawful in a sister state. See infra at 38-40.

of both federal and state power by the First and Fourteenth Amendments.

When the predecessor to 18 U.S.C. 1302 was enacted in the latter part of the 19th century, all three constitutional concepts supported a broad power to ban communication concerning gambling from the mails. The postal power was viewed as a broad charter to exclude material from the mails that was contrary to the public interest. Public Clearing House v. Coyne, 194 U.S. 497 (1904). Thirty-nine of the forty-two then existing states forbade lotteries altogether. S. Rep. No. 537, 98th Cong., 2d Sess. 3 (1984); S. Rep. No. 1579 , 51st Cong., 1st Sess. 1 (1890). And the First Amendment had not yet been developed into a significant force for the protection of free expression. E.g. Davis v. Massachusetts, 167 U.S. 43 (1897);

Patterson v. Colorado, 205 U.S. 454 (1907). Most importantly, federal statutes banning speech about gambling from the mails were quite properly viewed as exercises in cooperative federalism, pursuant to which the federal government deployed its postal power to reinforce the consensus police power judgments of the several States by banning speech from the mails that was generally unlawful. Not surprisingly, therefore, federal statutes excluding speech about gambling from the mails were upheld in Ex parte Jackson, 96 U.S. 727 (1877) and In re Rapier, 143 U.S. 110 (1892) as classic examples of cooperative federalism that did not raise serious free speech issues. See alsc Champion v. Ames, 188 U.S. 321 (1903).

A century later, however, all three constitutional concepts point in the

opposite direction. First Amendment protections, especially in the postal area, now preclude the federal government from transforming the postal power into a general power to censor. E.g. Lamont v. Postmaster General, 381 U.S. 301 (1965); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). Despite the Solicitor General's unfortunate evocation of dictum in Public Clearing House v. Coyne, supra, the postal power is no longer viewed as a general license to exclude speech from the mails on amorphous public policy grounds. Hannegan v. Esquire, Inc., 327 U.S. 146 (1946). See also, Manual Enterprises v. Day, 370 U.S. 478 (1962). Moreover, forty-five states now have exercised their police powers to permit gambling, especially by charities as a device to raise funds for eleemosynary activities. Thirty-six states

permit betting on horse races. Twenty-eight states now actually operate - and aggressively promote - state lotteries. S. Rep. No. 537, supra; S. Rep. 100-446, p.11-12, 9A U.S. Code, Cong. & Ad. News (1988), pp. 3081-82. Thus, when 18 U.S.C. 1302 is invoked today by the federal government to bar the mailing of truthful speech about charitable gaming - an activity that has now been deemed lawful under the consensus police power judgments of the States - it can no longer be characterized as an exercise in cooperative federalism. Rather, it is more properly viewed as an ill-considered attempt by federal postal officials to overrule the consensus police power judgments of the States concerning charitable gaming. As such, it transmutes the postal power into a forbidden national police power. Maryland v. Wirtz, 392 U.S.

183, 197 n. 27 (1968) (Harlan, J.). Moreover, when, as here, such a de facto national police power is used to censor truthful information about lawful activity in an effort to manipulate local behavior, the statute not only violates principles of federalism, it flatly contradicts the First Amendment. Bigelow v. Virginia, 421 U.S. 809 (1975).

C. Properly Construed, Neither The Prize-List Clause Nor The Advertisement Clause of 18 U.S.C. 1302 Authorizes The Postmaster To Interfere With The Mailing of Truthful Speech About Behavior That Is Lawful At The Point Of Mailing As Well As The Point Of Receipt

The Solicitor General argues that the prize list clause of 1302 precludes Minnesota charities from mailing prize lists directly to willing recipients, even

if they reside in Minnesota or in one of the forty-four other States that permit forms of gambling. Such a broad reading of 1302 - authorizing the Postmaster to censor mail concerning behavior that is lawful at the point of mailing and the point of receipt - raises difficult and far-reaching constitutional questions. If a plausible reading of the statute exists that would avoid those constitutional questions, this Court has repeatedly recognized the wisdom of adopting it. E.g. Lowe v. S.E.C., 472 U.S. 181 (1985); DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, ____ U.S.___ ,108 S. Ct. 1392 (1988). Precisely such a plausible narrowing construction emerges from the Solicitor General's assertion that the overriding purpose of 1302 is to prevent the erosion of the police power judgments

of those States that have chosen to ban all gambling.

Given this Court's decision in Bigelow v. Virginia, 421 U.S. 809 (1975), it is extremely doubtful whether any organ of the government - state or federal - can invoke censorship to prevent citizens of one state from learning about activity that is lawful in a sister state. Even if one assumes, however, that such a dangerous power is subsumed in the postal power, it can have no application in settings where the subject of the communication is lawful both at the point of mailing and point of receipt.

When the predecessor of 1302 was enacted in 1886, gambling was forbidden in virtually every state except Louisiana. Thus, in the eyes of the legislators who enacted 1302, the statute could not have

had a significant application to activity that was lawful at the point of mailing and the point of receipt. Such a shared legislative assumption as to the statute's reach should, amicus suggests, be respected by construing 1302, at a minimum, to apply to speech only when its subject is unlawful at either the point of mailing or receipt, especially since such a narrowing construction would minimize the constitutional issues raised by the statute.[6] See generally, Calabresi, A Common Law for the Age of Statutes, (1982).

In Lowe v. S.E.C., supra, for example, this Court construed the exemption for bona fide newspapers in the Investment Adviser's

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[6]Such a construction would not wholly eliminate the statute's constitutional difficulties, since, given Bigelow, censorship may not be used to block citizens of one State from learning about activity that is lawful in another State.

Act of 1940 broadly to include virtually all investment newsletters in order to avoid serious free speech issues. Similarly, in DeBartolo, this court viewed a proviso to the National Labor Relations Act as reflecting a general Congressional intent to permit analogous labor speech in order to avoid a difficult First Amendment question. This Court should similarly read 1302 narrowly to give effect to the contemporaneous assumptions of its enactors concerning its reach, thereby advancing the statute's purpose and enhancing its constitutionality.[7]

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[7] Smith v. United States, 431 U.S. 291 (1977) does not foreclose such a common sense construction.

In Smith a prosecution for mailing obscene matter in Iowa was sustained despite the fact that the mailing was intrastate at a time when Iowa had no law barring the sale of obscene material to adults. Smith is, however, distinguishable on two levels.

D. If 18 U.S.C. 1302 Is Construed To Apply To Truthful Information Concerning Activity That Is Lawful At The Point Of Mailing And The Point Of Receipt, The Statute Violates The First Amendment And Is Inconsistent With General Principles Of Federalism

The Solicitor General argues that 18 U.S.C. 1302 authorizes the Postmaster to

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First, the hiatus in Iowa obscenity laws was not attributable to an exercise of Iowa's police power judgment to permit obscenity. Rather, Iowa's obscenity law had been judicially invalidated in 1973 and was not re-enacted until 1976 because of disagreements over wording.

Second, the content of the mailing - hard core obscenity - was not deemed to be speech at all under this Court's traditional approach to the area and was, thus, entitled to no First Amendment protection, regardless of its treatment under state law. Roth v. United States, 354 U.S. 476 (1957).

The Smith case, therefore, posed neither a difficult federalism, nor an insuperable First Amendment, issue.

block a truthful communication between a Minnesota charity and a willing Minnesota listener because the communication concerns lawful charitable gaming activity. Such an outdated conception of the postal power poses a dramatic threat to our system of free expression. Given the importance of the mail as a medium of communication, it is not surprising that the evolution of First Amendment doctrine is closely intertwined with the placing of limits on the postal power.

The modern history of the First Amendment begins with Learned Hand's landmark refusal to permit the Postmaster to use the postal power to bar material from the mails by denying it third class mailing status. Masses v. Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), rev'd 246 F. 24 (2d Cir. 1917). See

Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719 (1975). The articulation of the "clear and present danger" test occurred in the context of a criminal prosecution for mailing anti-draft material to prospective draftees. Schenck v. United States, 249 U.S. 47 (1919). One of Justice Holmes' initial attempts to liberate free speech protection from the constraints of the "bad tendency" test occurred when the Postmaster revoked the mailing privileges of a newspaper. United States ex rel Milwaukee Social Democrat Publishing Co. v. Burleson, 255 U.S. 407, 436-38 (1921) (Holmes, J., dissenting). The first Act of Congress invalidated under the free speech clause of the Constitution authorized the Postmaster to interfere with the delivery of mail to

willing recipients. Lamont v. Postmaster General, 381 U.S. 301 (1965). See also, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946); Manual Enterprises v. Day, 370 U.S. 478 (1962); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970); Blount v. Rizzi, 400 U.S. 410 (1971); Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983).

As Justice Holmes initially argued in dissent almost seventy years ago in Milwaukee Social Democratic Publishing Co., speech that is protected against de jure governmental suppression by the First Amendment cannot be subjected to de facto censorship by excluding it from the mails.

The Solicitor General purports to accept Justice Holmes's formulation, but seeks to avoid its force by arguing that the mailing of a prize list is not

communication entitled to plenary free speech protection, but rather is a form of commercial speech entitled to little, if any, significant First Amendment protection. The Solicitor General is wrong on two levels.

First, his attempt to carve out an enormous slice of communicative activity relevant to economic decision-making and to characterize it as virtually unprotected is both unjustified and dangerous.

Second, his conception of the free speech protection available to commercial speech virtually emasculates the commercial speech doctrine by resurrecting the discredited "bad tendency" test applied by the Court during the 1920's over the dissents of Justices Holmes and Brandeis, rather than the four-part standard of Central Hudson, to measure the scope of

commercial speech protection. E.g., Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925).

(1) The Speech At Issue Qualifies For Plenary Free Speech Protection

The Solicitor General argues that communication loses its claim to plenary free speech protection whenever it "promotes or advances" an ordinary commercial transaction and the speaker "has a direct financial interest in either the transaction or its promotion", whether or not the communication is couched as a traditional commercial advertisement.

The Solicitor General is surely correct in observing that commercial speech and advertising are not coterminous. Much communication that appears in the form of a paid advertisement is entitled to plenary First Amendment protection. New York Times

Co. v. Sullivan, 376 U.S. 254 (1964). Similarly, communication need not be couched as a formal advertisement to constitute an invitation to enter into a proposed discrete commercial transaction. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). However, the extraordinarily broad criteria proferred by the Solicitor General radically expands a narrow category of of speech relating to discrete commercial transactions into a general description of most economically motivated speech. Under the Solicitor General's test, whenever a speaker's motivation for speech is primarily economic, the speech becomes a candidate for government regulation. A labor leader's criticism of management negotiation techniques; an auto-maker's support of highway construction; a

utility's defense of nuclear power; a broker's defense of the stock market; a doctor's objection to socialized medicine - all would, arguably, fall within the Solicitor General's commercial speech net.

As this Court has noted in Central Hudson, it may be appropriate to identify a narrow category of commercial speech entitled to a somewhat diminished First Amendment protection. That category should, however, be defined, not by the broad and amorphous criteria suggested by the Solicitor General, but by reference to the functional underpinnings of free speech protection.

When speech does little more than propose a commercial transaction, it generally involves a speaker whose only interest is the profit motive; a message that is of little or no interest to the

public-at-large; and a hearer whose sole - but highly significant - interest is obtaining information helpful in determining whether to enter into a discrete commercial transaction. Such speech, which is critical to the proper functioning of our economic structure, is subject to narrow government regulation to assure that the hearer's interest in receiving choice-enhancing information is advanced. See generally, Neuborne, Free Speech, Free Markets, Free Choice: An Essay On Commercial Speech, (1987).

Where, however, as here, the speaker's interest is broader than the profit-motive; the message is of interest to the general public; and the hearer's interest is broader than deciding whether to enter into a discrete commercial transaction, expansion of the concept of commercial

speech becomes intolerable.

No persuasive functional argument can be made in favor of treating prize lists sent by Minnesota charities to willing recipients as commercial speech. First, the interest of the charitable speaker is far broader than profit-maximization. Riley v. National Federation for the Blind, __ U.S.___, 108 S. Ct. 2667 (1988). The communications and the lawful charitable gaming activities at issue are integrally related to advancing the eleemosynary interests of the charities themselves. Thus, while solicitations might well be treated as commercial speech if made by an ordinary commercial speaker, the eleemosynary interest of the charitable speaker infuses the communication with plenary First Amendment protection. Compare Ohralik v. Ohio State Bar Ass'n,

436 U.S. 447 (1978) with In re Primus, 436 U.S. 412 (1978). See also, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

Second, the message is of interest to the general public. The fact of a prize winner; the nature of the prize; and the identities of the winners are of substantial interest to the public at large, regardless of whether individual hearers actually choose to gamble. The strong public fascination with news about the prizes and winners of state run lotteries demonstrates that the content of the message elicits interest from the public at large and cannot be treated as a narrow communication of interest only to potential participants in a discrete commercial transaction.

Finally, the hearers' interests in

receiving truthful information that is of substantial informational value in determining their general attitude toward charitable gaming is far broader than merely deciding whether to enter into a commercial transaction. It is precisely in areas that attract significant government regulation that the free flow of information about the regulated behavior is critical to the making of informed political as well as economic judgments. An informed judgment about the appropriate degree of government regulation of charitable gaming cannot be made in the absence of truthful information about how it actually works.

Thus, measured by the identity of the speaker; the nature of the message; and the interests of hearers, direct mail communications between a Minnesota charity

and a willing addressee are entitled to plenary constitutional protection.

(2) The Speech At Issue Is Entitled To Commercial Speech Protection Under The Central Hudson Test

Even if the Solicitor General is correct in characterizing prize lists as commercial speech, the communications are entitled to significant First Amendment protection. This Court has repeatedly recognized that the free flow of truthful information as to lawful products and services, relevant to the making of informed choices by consumers, is entitled to First Amendment protection. E.g. Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Carey v. Population Services

Int'l, 431 U.S. 678 (1977); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Central Hudson Gas & Electric Corp. v. Public Service Comm's, 447 U.S. 557 (1980); In re R.M.J., 455 U.S. 191 (1982); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

The motif that unites each of the commercial speech cases has been this Court's commitment to enhancing the hearer's capacity to make an informed and autonomous choice among lawful options. Thus, in those settings where the commercial speech in question did not enhance a hearer's capacity for autonomous choice, either because the choice was unlawful, or the form or content of the message was misleading, the speech was deemed unprotected. Ohralik v. Ohio State

Bar Ass'n, 436 U.S. 447 (1978); Friedman v. Rogers, 440 U.S. 1 (1879); Pittsburgh Press Co. v. Pittsburgh Committee on Human Relations, 413 U.S. 376 (1973).

In Central Hudson, the Court established a four-part test to assure that choice-enhancing commercial speech receives significant constitutional protection. Under the Central Hudson test, so long as commercial speech involves lawful behavior and is truthful, it may be suppressed only if the government demonstrates a "substantial interest" that is "directly advanced" by the regulation and which cannot be equally advanced by less drastic means. See also, Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986).

The Solicitor General argues that censorship of prize lists mailed by Minnesota charities to willing recipients

satisfies the Central Hudson test. In fact, it fails to satisfy even one aspect of the four-part test.

First, the Solicitor General argues that the "substantial interest" test is satisfied by the federal government's interest in preserving the police power judgments of those few remaining states that have chosen to ban charitable gaming. But this Court has already ruled that a State's police power does not include the power to prevent its citizens from learning about an activity that is lawful in a sister state. As Justice Blackmun noted for the Court in his opinion in Bigelow:

> A State...may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, ban a citizen of another state from disseminating information about an activity that is legal in that state.

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> Here, Virginia is really asserting an interest in regulating what Virginians may hear or read about New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders; activities that Virginia's police powers do not reach. 421 U.S. 824; 827-28 (emphasis in original).

Since this so-called "significant governmental interest" asserted by the Solicitor General is explicitly derivative of the State's police power; and since that police power does not include the power to ban speech about activity that is lawful in a sister state, it follows that the asserted governmental interest is not only not "substantial"; it is not even "legitimate".

Moreover, even if, despite Bigelow, the postal power were construed to

authorize an independent federal power to censor in aid of State police power judgments, no such power can be asserted to block the mailing of information concerning activity that is lawful both at the point of mailing and the point of receipt, since the postal power would contradict, not reinforce, the States' police power judgments.

Unlike the situation in Posadas,[8] where Puerto Rico invoked censorship in aid of its own police power judgment, the federal government lacks a national police power. As Justice Harlan noted in Maryland

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[8]It is not necessary to consider the correctness of the Posadas case since the federal government lacks a national police power. Amicus believes, however, that Posadas seriously misapplied the commercial speech precedents of the Court. Proper regard for the underpinnings of the First Amendment should lead the Court to reject attempts to use government information control as a device to manipulate consumer behavior.

v. Wirtz, supra, neither the commerce power nor the postal power can be used to establish a de facto national police power, especially when, as here, the States have reached a consensus that the activity in question is lawful.

Nor does the Solicitor General's alternative "substantial" interest fare better. The Solicitor General argues that the federal government has a substantial interest under the commerce clause in halting the spread of interstate lotteries operated by commercial entities because of potential infiltration of such lotteries by organized crime. However, when measured against a ban on the mailing of prize lists by Minnesota charities, the government's concern with organized crime is less than persuasive. It is difficult to understand how a ban on the mailing of prize lists by

Minnesota charities engaged in charitable fund-raising activity "directly advances" the government's interest in preventing organized crime from infiltrating large, interstate commercial lotteries. In fact, Justice Powell coined the "directly advances" test in Central Hudson in order to guard against precisely such an attempt to invoke Rube Goldberg causation as a justification for censorship. If banning charities from sending prize lists "directly advances" the fight against organized crime, the Central Hudson test will have been drained of virtually all meaning.

Finally, even if one pretended that the government had identified a "substantial interest" that was "directly advanced" by the censorship, it is patently clear that the government's interests are

capable of equally effective protection without resorting to censorship of the mails.

For example, the government's asserted interest in preserving the police power judgments of those states that ban charitable gaming, even if it can be said to have survived Bigelow v. Virginia, supra,[9] is better advanced by selective mail blocks that prevent delivery in those states, but permit mailing and delivery in the 45 states that have evinced a contrary judgment. The government's assertion that it can censor the mail in derogation of the police power judgments of forty-five states in order to preserve the judgment of five is indefensible. Just as an entire category of speech may not be denied to

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[9]Amicus does not believe that such a power exists.

willing hearers merely to shield unwilling hearers, so the citizens of forty-five states may not be denied lawful mail merely to shield five states from unwanted information. Compare, Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) with Rowan v. Post Office Dep't, 397 U.S. 728 (1970). See also, Hynes v. Borough of Oradell, 425 U.S. 610 (1976).

Similarly, the government's asserted interest in impeding the growth of privately operated interstate lotteries as a means of combatting organized crime is equally advanced by strict regulation of charitable gaming. It should not be beyond the combined capability of state and federal authorities to assure that church bingo games do not become a front for organized crime.

Whenever the government seeks to

censor, respect for First Amendment values requires that the government satisfy its significant burden of justification. While the precise size of the burden of justification may vary depending on whether the speech involves politics, religion, science, art or commerce, at a minimum, the government must demonstrate a genuine need to act in derogation of the strong presumption in favor of the free flow of information created by the First Amendment. No such showing can be made in this case.

(3) The Speech At Issue Is Entitled To Protection Under The Non-Discrimination Provisions Of The First Amendment

This Court has repeatedly recognized that attempts to impose differential rules on speakers based upon the content of the speech or the identity of the speaker pose serious dangers to a system of free

expression. E.g. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Arkansas Writer's Project, Inc. v. Ragland, ___ U.S. __, 107 S. Ct. 1722 (1987). Where, as here, Congress has authorized state lotteries to use the mails an an effective means of communicating with willing hearers, it may not deny equal access to private speakers who wish to convey similar messages about equally lawful private activity.

Where government and private entities are engaged in lawful competition, government may not award itself an enormous competitive advantage by rigging the rules governing communication with prospective consumers in favor of the State-run enterprise. All discriminatory speech

rules are dangerous; but discriminatory speech rules designed to benefit government speakers at the expense of competing private speakers are absolutely intolerable. Schacht v. United States, 398 U.S. 58 (1970). See Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975).

Where, as in Pittsburgh Press, commercial speech concerns unlawful behavior; or, as in Friedman v. Rogers, it is misleading, the speech enjoys no constitutional protection. But where, as here, commercial speech is truthful and describes a lawful consumer choice, the government may not selectively ban the private speech in order to provide a competing government speaker with an information monopoly. Thus, as long as 18 U.S.C. 1307 authorizes state lotteries to

use the mails, private charities engaged in equally lawful behavior may not be denied equal access to a significant method of communicating with the public.

Conclusion

For the above-stated reasons, the appeal should be dismissed for lack of jurisdiction. In the alternative, the decision below should be affirmed.

Dated: New York, New York
January 19, 1989

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No. 87-1956
SUPREME COURT OF THE UNITED STATES
October Term 1988

Anthony M. Frank,
Postmaster General of the United States,
et al.

Appellants

v.

Minnesota Newspaper Association, Inc.,

Appellee

On appeal from the
United States District Court,
District of Minnesota

Brief Amicus Curiae of the American Civil Liberties Union and Minnesota Civil Liberties Union

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INTEREST OF THE AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 250,000 members, dedicated to preserving and protecting the fundamental rights of the people of the United States. The Minnesota Civil Liberties Union (MCLU) is one of its state affiliates, a private, non-profit, non-partisan, membership-supported organization having approximately 4,000 members in

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1 Letters from both parties consenting to the participation of Amici in this appeal are set forth in the brief Amicus Curiae of the Minnesota Civil Liberties Union respecting jurisdictional statements, previously filed with this court.

the State of Minnesota. Its purpose is the protection of the rights and liberties preserved by the Minnesota and United States constitutions, including freedom of speech and of the press.

SUMMARY OF ARGUMENT

As a threshold matter, the Court should dismiss this appeal because it does not present a case or controversy. Recent congressional legislation has legalized all the speech at issue in this case, both commercial and non-commercial.[2]

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2 See Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (1988); Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988).

Moreover, the parties themselves do not dispute the very question at issue in this case, the prohibition in 18 U.S.C. § 1302 on the mailing of newspapers containing "prize lists." Indeed, the Government's argument is premised on the notion that Section 1302 should not be read to apply to editorials, news stories, or documentaries about lotteries. Similarly, MNA's brief to the Court disavows any interest in the application of the "prize list" prohibition beyond the scope of news and editorials. The appeal therefore presents no live case or controversy for the Court to resolve.

The Court must also reject the Government's proposed interpretation of the "prize list" prohibition. The language of the statute simply will not sustain the Government's attempts to narrow it to the Government's view of permissible restrictions on commercial speech. What is suggested is not merely an interpretation of the statute, but a complete rewriting, a task better left to Congress. Moreover, even if the Government's proposed interpretation were tenable in the abstract, the Government has not in practice applied the statute with that narrow view. The record in this case, although sparse, clearly demonstrates

attempts by the Postal Service to influence newspapers' news and editorial content pursuant to Section 1302, in direct contradiction to the Government's purported position here. Accordingly, the trial court correctly ruled that the "prize list" prohibition on its face impermissibly restricted non-commercial speech, regardless of whether such restrictions on commercial speech would have been permissible.

In addition, the ACLU agrees with appellees that the redefinition of the commercial speech test proposed by the Government is unsupported by this Court's past decisions and, if

accepted, would seriously erode important First Amendment freedoms. We also agree with the position, advanced by other amici, that the total ban embodied in Section 1302 would not be justified even if this were a commercial speech case. To avoid unnecessary repetition, those arguments have not been repeated here.

ARGUMENT

I. This appeal does not present the court with a case or controversy for resolution.

The Court should dismiss this appeal on the ground that the appeal no longer presents a justiciable case or controversy. Two separate factors combine to make the mootness of this

appeal clear. First, since the District Court's decision from which the appeal is taken, Congress has passed two separate Acts that between them remove all the prohibitions on speech complained of in plaintiff's original Complaint. Those statutes, the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (1988), and the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), remove the prohibitions of 18 U.S.C. § 1302 on speech relating to lotteries conducted by not-for-profit organizations and Indian tribes respectively. Second, the MNA's

complaint addresses only speech concerning such non-profit and tribal gaming. See Complaint at ¶ ¶ 6-10, 15-18.[3] All the prohibitions that were at issue in this case have thus been removed.[4]

The Court thus has no justiciable controversy before it. See New Jersey State Lottery Commission v. United States, 491 F.2d 219 (3d Cir. 1974), vacated and remanded, 420 U.S. 371

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3 Joint App. at 4-6.

4 The fact the removal of the prohibitions will not actually take effect until May 7, 1990, see Pub. L. 100-625, § 5, does not create a justiciable controversy here. The Minnesota Newspaper Association states in its brief that it is willing to wait until the effective date and will not contest the prohibitions in the meantime. MNA Brief at 5.

(1975). Although the Government correctly points out that Section 1302 continues to apply to speech concerning private, for-profit lotteries, this appeal does not present that case; neither the Complaint nor the decision of the court below raises or addresses that issue. This case involves (and has always involved) only speech concerning non-profit and tribal lotteries, and, as demonstrated by the MNA's voluntary dismissal of its cross-appeal concerning the prohibition on the advertising of such lotteries, Congress has resolved that issue.

Perhaps even more significantly, however, the briefs of the respective

parties demonstrate that the parties themselves do not disagree about the result that the Court should reach in this matter. The Government concedes here that:

> . . . Section 1302 should not be read to apply to other forms of commentary about lotteries, such as editorials, news stories, or documentaries.

Brief of Federal Parties at 30.[5]

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5 Notably, the Government took a considerably different position in the court below. There the Government argued

> To the extent the matter excluded from the mails includes any list of prizes awarded, and the court construes this to include lists contained in

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Correspondingly, the MNA's brief withdraws the MNA's objection to the prize list clause as it relates to speech other than news stories and editorials. MNA Brief at 5.

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5 (FOOTNOTE Continued From Previous Page)

> a news report or in an editorial, defendants submit that the restrictions still survive scrutiny under the First Amendment since the restriction is necessary to serve compelling state interests -- namely, the three interests already advanced to justify the statutory scheme under the Commercial Speech Doctrine -- and is narrowly drawn to achieve that end. [citation omitted]

Defendants' Memorandum of Law and Response to the Memoranda Filed in Support of Plaintiff's Motion for Summary Judgment at 5.

Accordingly, both parties appear to be in agreement with the holding of the District Court:

> Accordingly, this court holds that section 1302 does not authorize the exclusion from the mails of newspapers containing general news reports or editorial comment regarding lotteries.

677 F. Supp. 1400, 1409. In short, despite the nominally adversarial briefs submitted to the Court, both parties apparently would reach the same result on the actual issue presented for review. Under these circumstances, there is no controversy before the Court, and the appeal should be dismissed. See Deakins v. Monaghan, 484 U.S. _____, 98 L.Ed.2d 529, 538-39

(1988); United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950).

II. Section 1302 has not been and cannot reasonably be interpreted as the Government proposes.

If the Court reaches the merits of the controversy, amici respectfully submit that the constitutionality of Section 1302 must be resolved based on the language of the statute and the manner in which it has been applied, rather than relying on the inventive reinterpretation put forth by the government for the first time in its brief to this Court.

Specifically, the government now argues -- contrary to the position it took earlier in this litigation -- that

Section 1302 "should be construed to apply only to prize lists that constitute commercial speech." Appellants' Brief at 22. Leaving aside for a moment the novelty and inappropriateness of the Government's proposed new definition of commercial speech,[6] both the language of the

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6 The difficulties with and the unprecedented nature of the Government's proposed definition of commercial speech is addressed in detail in the brief of Appellee Minnesota Newspaper Association. The Court has long and repeatedly rejected the "financial interest" litmus test for commercial speech urged by the Government here. See, e.g., New York Times v. Sullivan, 376 U.S. 254, 266 (1964). In fact, the contrary doctrine is so firmly established that one might be tempted to treat the Government's argument as a throwaway if it were not the sum and substance of the Government's appeal. Amici are mystified

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statute and the demonstrated practice of the Post Office belie the Government's purported narrow construction.

A. The language of the statute does not support the Government's interpretation.

Section 1302 reads in relevant part:

> Whoever knowingly deposits in the mail or sends or delivers by mail:
>
> . . .

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6 (FOOTNOTE Continued From Previous Page)

as to why the Government pushes this issue, not raised in the district court, so forcefully when the issue has no bearing on the result in this case.

> any newspaper . . .
> containing any list of
> the prizes drawn or
> awarded by means of any
> such lottery, gift
> enterprise or scheme,
> whether said list
> contains any part or all
> of such prizes;
>
> . . .
>
> shall be fined not more
> than $1,000 or imprisoned
> not more than two years,
> or both; and for any
> subsequent offense shall
> be imprisoned not more
> than five years.

The Government urges that this statute be interpreted to apply only to

newspapers publishing paid prize lists[7] or prize lists for lotteries in which the newspaper has a financial interest. Government's Brief at 29. The Government relies on an extensive history of the nineteenth century lottery legislation, and claims to glean from that century-old history the conclusion that the legislation was not intended to affect news and editorial matter. The Government apparently reasons that because Congress did not

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7 The Government refers in its Brief to the possibility that a newspaper would be "paid to publish a list of lottery prizes or winning lottery numbers." Government Brief at 29. How this differs from the advertising permitted under the new Acts, see footnote 2 supra, the Government does not indicate.

believe that the Anti-Lottery Act violated the First Amendment, see Government's Brief at 26, and because the Government now apparently concedes that restrictions on news and editorial content would violate the First Amendment, Government's Brief at 30, Congress must not have intended to prohibit news and editorials concerning lotteries.

The government's exercise in deductive reasoning is flawed and unpersuasive. The fact that government counsel has now concluded -- midway through this litigation -- that news and editorial content cannot constitutionally be reached by

Section 1302 has no bearing on whether Congress intended to include such materials within its prohibition one hundred years ago. After all, the Government took the position in the court below that news and editorial content could be constitutionally prohibited under Section 1302.[8] Its recent change in position does not and cannot retroactively change the intent of Congress.

More significantly, however, the Government does not address the plain language of the statute. By its express terms, the statute prohibits

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8 See footnote 5 supra.

the mailing of "newspapers . . . containing <u>any</u> list of prizes." (emphasis added) It does not merely prohibit the mailing of newspapers containing paid prize lists or of containing prize lists of lotteries in which the newspaper has a financial stake, nor can such a limitation be reasonably inferred. Thus, the Government is not asking for a simple "interpretation," as its citations suggest;[9] the Government is asking

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9 For example, the primary case on which the Government relies, <u>United States v. 12 200 Ft. Rolls of Super 8 mm. Film</u>, 413 U.S. 123 (1973), is completely inapposite. As the Government itself notes, that case involves the

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the Court to rewrite the statute to include limitations that contradict the plain language of the statute as enacted. The court should reject the Government's attempt at statutory reconstruction and leave such matters to the deliberative process of Congress.[10]

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9 (FOOTNOTE Continued From Previous Page)

interpretation of a word in a federal statute so that the definition is consistent with prior Supreme Court case law. Here, the Government is not asking the court to define an ambiguous term, but to infer limitations on a statute that contradict the statute's plain language.

10 Interestingly, the Government has no difficulty applying the literal language of the

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B. Government practice does not support the Government's purported interpretation.

The Government's actual practice in applying the "prize list" prohibition in Section 1302 also contradicts the statutory interpretation now urged to this Court. As demonstrated by its own regulations and the facts in this case, the Government has routinely and

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10 (FOOTNOTE Continued From Previous Page)

statute in a manner contrary to the legislative history when the application suits the Government's purpose. Although acknowledging that the prize lsit prohibition historically addressed only lists of future prizes, the Government notes that the statutory language is not so restricted. The Government then urges that other policy reasons require the unrestricted reading of the statute, despite the historical inconsistency. See Government Brief at 23, n. 26.

systematically applied Section 1302 to newspapers' news and editorial content.

The most prominent example of the Government's broad day-to-day interpretation of the statute may be found in the U.S. Postal Service's Domestic Mail Manual, incorporated into the Code of Federal Regulations by 39 C.F.R. §§ 111.1 et seq. Courts have long recognized that statutes may not give those charged with applying them complete guidance, and that various agencies may therefore establish more detailed rules interpreting those statutes for day-to-day use. See, e.g., Rockville Reminder, Inc. v. United States Postal Service, 480 F.2d

4, 7 (2d Cir. 1973). Yet despite the opportunity to clarify the statutory prohibition on prize lists and to restrict it to noneditorial material, the Domestic Mail Manual uses the same broad language as its statutory parent:

> The following matter is unlawful mail matter:
>
> ***
>
> d. Any newspaper, circular, pamphlet, or publication of any kind containing . . . any list of prizes awarded in [a lottery or similar enterprise].

Domestic Mail Manual § 123.422(d). The narrow construction of Section 1302 urged to this Court thus differs considerably from the daily direction given to postal workers.

The record in the present case also demonstrates that the broad language of the Domestic Mail Manual has real life consequences. Paragraph 16 of Plaintiff's Complaint states, and the Government did not dispute for summary judgment purposes,[11] that

> [b]ecause the language of the statutes is vague and unclear and because the interpretation and application by the USPS have been inconsistent, arbitrary, and confusing, the MNA and its members have no clear idea as to what may be lawfully published and have found

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11 See Defendant's Memorandum of Law and Response to the Memoranda Filed in Support of Plaintiff's Summary Judgment Motion at 2 ("defendants are willing to assume that the material facts underlying this action are true." (footnote omitted).

> it necessary to avoid publishing not just advertising but nearly all copy involving gaming activities dependent on chance for fear of being subjected to the sanctions and penalties described above.
>
> Joint App. at 6. (emphasis added).

The USPS practice of going after news and editorial matter as well as advertising is also documented by the affidavits plaintiff submitted in support of its Motion for Summary Judgment. According to those affidavits, the U.S. Postal Service applies Section 1302 and the regulations in an unpredictable and inconsistent manner, inhibiting publication not only of advertising but

of news stories, feature stories, editorials, pictures, and community calendar items about lotteries.[12] The Government, on the other hand, has submitted no material whatever suggesting that its actual practices are in any way consistent with the interpretation that it now urges on this Court. Given this chasm between what the Government preaches and what it practices, this Court should reject the Government's proposed interpretation and affirm the decision of the trial court.

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12 See Affidavit of Linda I. Falkman, Joint App. at 14-16 (especially paragraphs 8, 9); Affidavit of Mark R. Anfinson, Joint App. at 17-20.

III. The trial court correctly held the prize list prohibition in Section 1302 unconstitutional on its face.

Contrary to the Government's characterization, the district court correctly interpreted the precedent concerning commercial and noncommercial speech and properly declared the prize list prohibition unconstitutional. The trial court looked at the plain language of the statute and the actual practices of the Government, both discussed above, and concluded that the statute applied to both commercial and noncommercial speech. The court then looked for a compelling Government reason for the restrictions on the noncommercial speech and found none.

The court therefore concluded that, regardless of whether the restriction on commercial speech was constitutionally permissible, the restrictions on noncommercial speech without a compelling Government interest rendered the prohibition facially unconstitutional.[13]

Contrary to the Government's assertion, the District Court did not conclude:

> that commercial speech and advertising are coterminous and that a law regulating something

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13 That a statute may have constitutional applications does not, of course, prevent it from being facially unconstitutional if it is "substantially overbroad." See, e.g., Secretary of State of Maryland v. J.H. Munson Co., 467 U.S. 947, 964-65, 81 L.Ed.2d 786, 104 S.Ct. 2839 (1984).

> other than advertising cannot be regarded as a regulation of commercial speech.

Government Brief at 29. On the contrary, the District Court specifically noted: "It is the context of the prize list, in advertisement or news reports, that determines the level of protection." 677 F.Supp at 1407.

It is also critical to note that the District Court's decision did not rely on drawing a fine-line definition of commercial speech, as the Government urges this Court to do, nor does resolution of this case require such draftsmanship. Instead of looking for the line beyond which prize lists would lose their character as noncommercial

speech, the District Court simply concluded that, wherever that line is, the news reports and editorial content restricted by the statute, the postal regulations, and the practice of the Post Office fall on the noncommercial side of it. Because the statute imposed impermissible restrictions on noncommercial speech, regardless of where the commercial-noncommercial line is drawn, the court held the statute facially unconstitutional.[14]

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14 The government's reliance on the greater/lesser rationale of Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986), fails once it is acknowledged that Section 1302 reaches non-commercial speech. See Meyer v. Grant, 108 S.Ct. 1886, 1893-94 (1988).

It is of course this aspect of the lower court's decision that prompts the Government's current attempts to revise history and backpedal on its interpretation of Section 1302. The record before the District Court was sufficient, however, to demonstrate to the trial court that the practice and policy of the Government was consistent with the plain language of Section 1302 and in fact restricted news coverage of lotteries. By ignoring the undisputed record before the trial court, the Government asks this Court to render a decision that could make sense only in the imagined world created between the covers of the Government's brief. The

Government also asks this Court to unnecessarily re-define commercial speech in terms that have no basis in precedent and will have no effect on the result of this case. The Court should reject the Government's broad invitation, resolve the case at hand, and affirm the District Court's decision.

CONCLUSION

The judgment of the District Court invalidating the prize list clause in 18 U.S.C. Section 1302 should be affirmed.

Respectfully submitted,

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